UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, MICHIGAN,	.	Docket No. 13-53846
	.	Detroit, Michigan
	.	September 2, 2014
Debtor.	.	9:45 a.m.

. . . . . .

HEARING RE. (#6699) FINAL PRETRIAL CONFERENCE (RE. EIGHTH AMENDED ORDER ESTABLISHING PROCEDURES, DEADLINES AND HEARING DATES RELATING TO THE DEBTOR'S PLAN OF ADJUSTMENT); (#6787) MOTION TO EXCLUDE THE TESTIMONY OF KENNETH A. BUCKFIRE REGARDING CREDITOR RECOVERIES UPON DISMISSAL OF THE BANKRUPTCY CASE FILED BY INTERESTED PARTIES SYNCORA CAPITAL ASSURANCE, INC., SYNCORA GUARANTEE, INC.; (#6978) MOTION IN LIMINE TO PRECLUDE DEBTOR FROM OFFERING EVIDENCE RELATING TO (A) THE RECOVERIES OF CLASSES 10 AND 11 INDEPENDENT OF THE FUNDS FROM THE DIA FUNDING PARTIES AND THE STATE AND (B) THE TOPICS IDENTIFIED IN SYNCORA'S SUBPOENAS TO THE FOUNDATIONS FILED BY INTERESTED PARTIES SYNCORA CAPITAL ASSURANCE, INC., SYNCORA GUARANTEE, INC.; (#6979) MOTION IN LIMINE BARRING THE CITY FROM INTRODUCING COMMUNICATIONS PROTECTED BY THE COURT'S MEDIATION ORDER FILED BY INTERESTED PARTIES SYNCORA CAPITAL ASSURANCE, INC., SYNCORA GUARANTEE, INC.; (#6982) MOTION IN LIMINE BARRING THE CITY AND PLAN SUPPORTERS FROM INTRODUCING EVIDENCE REGARDING THE POTENTIAL PERSONAL HARDSHIP OF PENSIONERS FILED BY INTERESTED PARTIES SYNCORA CAPITAL ASSURANCE, INC., SYNCORA GUARANTEE, INC.; (#6985) MOTION/FINANCIAL GUARANTY INSURANCE COMPANY'S MOTION IN LIMINE TO PRECLUDE THE INTRODUCTION OF EVIDENCE OR TESTIMONY REGARDING MATTERS WITHHELD FROM DISCOVERY ON THE BASIS OF THE MEDIATION ORDER FILED BY CREDITOR FINANCIAL GUARANTY INSURANCE COMPANY; (#6990) MOTION/ FINANCIAL GUARANTY INSURANCE COMPANY'S MOTION IN LIMINE TO PRECLUDE THE INTRODUCTION OF EVIDENCE OR TESTIMONY REGARDING CERTAIN MATTERS PREVIOUSLY DEEMED IRRELEVANT BY THE COURT OR THE CITY OF DETROIT FILED BY CREDITOR FINANCIAL GUARANTY INSURANCE COMPANY; (#7001) MOTION IN LIMINE TO PRECLUDE ITS COUNSEL, EVAN MILLER, FROM BEING CALLED AS A TRIAL WITNESS FILED BY DEBTOR IN POSSESSION CITY OF DETROIT, MICHIGAN; (#6699) PLAN CONFIRMATION HEARING

BEFORE THE HONORABLE STEVEN W. RHODES
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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For the Detroit Police Officers Association:	Erman, Teicher, Zucker & Freedman, P.C. By: BARBARA A. PATEK 400 Galleria Officentre, Suite 444 Southfield, MI 48034 (248) 827-4100
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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

THE CLERK: 13-53846, City of Detroit, Michigan.

THE COURT: Appearances, please.

MR. SHUMAKER: Good morning, your Honor. Greg Shumaker of Jones Day for the City of Detroit. I'm with my colleagues from Jones Day, Geoff Irwin, Bruce Bennett, Geoff Stewart, and Tim Cullen and Mr. Hertzberg from Pepper Hamilton.

MR. HACKNEY: Your Honor, good morning. Stephen Hackney on behalf of Syncora along with Marc Kieselstein, Doug Smith, Richard Howell, and Bill Arnault.

MR. BRILLIANT: Good morning, your Honor. Allan Brilliant on behalf of Macomb County by and through its public works administrator, Anthony Marrocco, and the Macomb Interceptor Drain Drainage District. I'm joined here by my colleague, Debra O'Gorman.

THE COURT: Thank you.

MR. DECHIARA: Good morning, your Honor. Peter DeChiara from the law firm of Cohen, Weiss & Simon, LLP, for the UAW International Union.

MS. QUADROZZI: Good morning, your Honor. Jaye Quadrozzi, Young & Associates, on behalf of Oakland County joined in the courtroom this morning by Joseph Fischer and Robert Weisberg of Carson Fischer also on behalf of Oakland County.

MR. SOTO: Good morning, your Honor. Ed Soto. I'm

here with my colleague, Alfredo Perez, from the law firm of Weil, Gotshal & Manges on behalf of FGIC.

MR. HOWELL: Good morning, your Honor. Steven Howell, Dickinson Wright, special assistant attorney general, representing the State of Michigan. Along with me today -- with me today is Matthew Schneider, chief counsel in the Attorney General's Office also representing the State of Michigan. Thank you.

MR. WAGNER: Your Honor, Jonathan Wagner from Kramer Levin representative the ad hoc COPs. Also with me is Deb Fish from Allard & Fish.

MR. NEWMAN: Good morning, your Honor. Max Newman of Butzel Long on behalf of Wayne County.

MR. MONTGOMERY: Good morning, your Honor. Claude Montgomery, Dentons US, for the Retiree Committee. With me today is Sam Alberts and Dan Barnowski, my partners. Thank you.

MS. PATEK: Good morning, your Honor. Barbara Patek, Erman, Teicher, Zucker & Freedman, appearing this morning on behalf of the Detroit Police Officers Association.

MR. GORDON: Good morning, your Honor. Robert Gordon of Clark Hill on behalf of the Detroit Retirement Systems. With me today from Clark Hill are Ron King, Jennifer Green, Sean Gallagher, and Shannon Deeby. Thank you.

MR. O'REILLY: Good morning, your Honor. Arthur O'Reilly with Honigman Miller. Also with me is Jason Abel also of Honigman Miller and Richard Levin of Cravath, Swaine & Moore. We represent the DIA.

MR. LAROSE: Good morning, your Honor. Lawrence Larose from Chadbourne & Parke for Assured Guaranty. With me is my partner, Robert Schwinger.

MR. NEAL: Good morning, your Honor. Guy Neal, Sidley Austin, for National Public Finance Guarantee Corp.

MR. PLECHA: Good morning, your Honor. Ryan Plecha from Lippitt O'Keefe Gornbein on behalf of the retiree association parties.

MR. MACK: Hi, your Honor. Richard Mack with Miller Cohen with AFSCME.

MR. QUINN: Good morning, your Honor. I'm John Quinn representing myself, a member of Class 11, an objector.

MR. KARWOSKI: Good morning, your Honor. Michael Karwoski, individual objector.

THE COURT: Thank you. Any other appearances for the record?

MR. LERNER: Your Honor, on the telephone Stephen Lerner and Scott Kane of Squire Patton Boggs for your expert, Ms. Kopacz.

MR. RAMIREZ: Good morning, your Honor. John Ramirez, Katten Muchin Rosenman, LLP, on behalf of Deutsche

Bank AG London.

MS. GOING: Good morning, your Honor. Kristen Going, Drinker, Biddle & Reath, on behalf of Wilmington Trust as contract administrator.

THE COURT: All right. In my order of August 28th, I had said that I wanted to do the final pretrial first and then the motions in limine. I do want to stick with that order rather than do the motions in limine first, so let's begin with the final pretrial conference.

First, I want to thank all of the attorneys for what must have been a monumental effort in putting together the corrected amended stipulation to entry of corrected amended joint final pretrial order. Thank you. I am going to enter an order I hope later today admitting into evidence those exhibits as to which no objections were indicated in the attachments to that document. We are in the process of making sure that our list of what those exhibits are is accurate.

I do have a couple of points to raise regarding the exhibits. One second please. First, Syncora proposes to offer into evidence in Exhibits 4617 through 4647 various statutes. Mr. Hackney, normally we do not admit into evidence statutes. What's going on there?

MR. HACKNEY: I agree with you. The custom, I think, your Honor, is for the Court to take judicial notice

of the law, and I don't have a problem with that. I think there are some circumstances where if the statute is a historical statute there are times when it may actually come into evidence as evidence of what the law was at a different point in time, and I can't speak to all of the statutes on the list, so to the extent they were --

THE COURT: These are all current statutes.

MR. HACKNEY: Then we would expect that they would --

THE COURT: And actually what we take judicial notice of are facts, not law. We find the law.

MR. HACKNEY: Well, we won't seek to enter these into evidence, your Honor, but we have marked them for purposes of identification.

THE COURT: All right. If you want, you know, to discuss with a witness some statute and use this marked version of it for that purpose, that's fine, but I don't want to admit it into evidence.

MR. HACKNEY: Understood.

THE COURT: All right. So we will take that off of the admitted list even though no one objected.

Secondly, I think it was FGIC -- yes -- FGIC proposed to offer into evidence Exhibits 3578 through 3902. These appear to be PDF's of various works of art at the DIA. The city objected, I noted, on the grounds of hearsay, and so

I wondered if these works of art were really being offered to prove the truth of anything they assert and, if not, why a hearsay objection is a proper objection.

MR. IRWIN: Your Honor, Geoff Irwin from Jones Day for the record. These may have been part of the number of exhibits that came in late in the process that we had the --

THE COURT: They're not.

MR. IRWIN: Okay. To the extent that the images are simply being offered to show what is being displayed at the Detroit Institute of Arts or what an expert considered in connection with reaching his or her opinion on valuation, we don't have an objection as to hearsay, so we withdraw that.

THE COURT: All right. Well, let's just clarify that that's what FGIC's intention with this offer is.

MR. SOTO: Yes, your Honor, it is.

THE COURT: All right. The Court will admit those into evidence along with the others that there was no objection to.

(FGIC Exhibits 3578-3902 received at 9:54 a.m.)

THE COURT: One other thing, and perhaps, Mr. Irwin, you're the right person to talk to about this. When we were in court the other day, we admitted into evidence documents with exhibit numbers that had letters in them, and I expect that the numbers have since been changed to eliminate the numbers, and, if so, what are the new numbers for those

exhibits? Can you help me with that?

MR. IRWIN: Your Honor, we believe that we provided a letter with the new numbers for those exhibits. It's something that we can certainly clarify and reprovide.

THE COURT: You sent us a letter?

MR. IRWIN: Correct.

THE COURT: Okay. Do we have that, Chris? Okay. All right. We do have that. My apologies to you. All right. So we will get that corrected in our exhibit list. I'm keeping an Excel spreadsheet in numerical order of exhibits that have been offered and either admitted or denied or stipulated to, and I want to keep that 100-percent accurate, of course. All right. So that's all I had on my agenda for the final pretrial conference. Let me ask you, the attorneys, if there are any issues you'd like to raise in the context of the final pretrial conference, please.

MR. SHUMAKER: Your Honor, again, for the record, Greg Shumaker of Jones Day for the city. I think both Mr. Hackney and I at least have some issues we wanted to raise with you, and the first is I wanted to share with your Honor an agreement that the -- all the parties reached about openings, which is a little -- always a little scary proposition, agreeing to ground rules without including your judge, so we kind of wanted to share this up front. And if you --

THE COURT: Sure. Go ahead.

MR. SHUMAKER: If you think -- don't think this works, obviously you wouldn't -- but this is what we did with regard to demonstratives that the parties might be using in their openings. We sort of agreed on four rough categories of demonstratives. The first would be what we would consider sort of your classic summary demonstrative that sort of explains or reflects or summarizes other testimony or evidence such as the ones that were used with Mr. Cline, and so with regard to those -- that category, last night at about five o'clock the parties exchanged what they would be using so that we could see in advance and presumably raise issues if we had them. As I say that, I guess it would be hard to undo that, so if you don't agree with that one, we would --

THE COURT: Fine.

MR. SHUMAKER: But hopefully that one is okay.

THE COURT: Sure.

MR. SHUMAKER: The second one is objectionable evidence. We went through sort of the fact that a lot of the exhibit objections have not obviously been resolved. The Daubert motions still are outstanding, and, you know, the deposition designations still need to be ruled upon, so what we agreed to, with your Honor's permission, was that because everyone wants the openings to go as seamlessly as they can, we would agree that if a deposition excerpt was shown that

had been objected to, that was okay, and that the objecting party would withhold the objection until later, and the party using that kind of deposition excerpt would, of course, run the risk that at the end of the closings if that testimony did not -- was not permitted by your Honor, we, of course, the objecting party, whoever that might be, would be able to point that out and would also probably move to strike that as well, but we wanted to move this along as much as we can. So, for example, you know, if someone wants to talk about one of the art experts, we didn't want to have to resolve the Daubert motion because that's inconsistent with your Honor's order, so that was the objectionable evidence category. There was no exchange of exhibits last night in connection with that.

The third category were video clips, and, as your Honor knows, you already ruled upon Mr. Hackney's request to allow video clips. That then raises the issue of whose video clips can you show. There are both deposition video clips as well as perhaps clips of certain people making statements in public such as You Tube videos or things that are out there. What we kind of worked out amongst ourselves was this, that if you were going to show a clip for -- I don't believe the city will be showing any clips, but if some of the objectors show video clips of witnesses who could bind the city and are, therefore, admissions either in deposition or in public,

that we would not be objecting to that, but if there's videotape of witnesses who could not bind the city or who are not with the city -- for example, Mr. Rapson of the Kresge Foundation is mentioned in some of the motions in limine, and there's a You Tube video of him -- if that were to come up, the city would reserve the right to object because it is classic hearsay.

THE COURT: Well, of course, the purpose of opening statements is to give the Court each party's perspective on the evidence that they intend to prove in the hearing; right? Can we all agree on that much? In that connection, of course, what an attorney presents to the Court has to be grounded -- in an opening statement has to be grounded in a good faith belief that the evidence discussed in the opening statement is admissible evidence, will be offered, and that any objections to it can arguably be overcome. That's the only standard I would apply here.

MR. SHUMAKER: And that's -- in response to an objection to such a video clip, that's what you --

THE COURT: I mean it's not an objection to a statement in opening statements that the discussed evidence is not admissible. That's not a proper ground to object during opening statement.

MR. SHUMAKER: One of the reasons --

THE COURT: You don't waive any objections to the

admissibility of evidence by not objecting to its discussion in the opening statement.

MR. SHUMAKER: One of the -- one of the reasons this came up, as you'll recall, your Honor, during eligibility, how scrupulous you were about not hearing or seeing evidence that wasn't in the record, and so we were trying to be consistent with that approach. So if you show the clip and it's Mr. Rapson giving his statement --

THE COURT: Well, if who's ever proffering that has a good faith basis to believe that that clip is admissible in evidence, I don't want to restrict opening statement. If it eventually doesn't come in, so be it, and it won't be considered in the Court's deliberation on the issues.

MR. SHUMAKER: And we would move to strike, correct, your Honor. So that was the video clip --

THE COURT: Okay.

MR. SHUMAKER: -- understanding. And then the last category were what I characterize as amplification demonstratives. Those would be, you know, a demonstrative that would show the statute or would pull out deposition testimony or exhibits, pull out certain parts of exhibits, and the parties agreed that we would not exchange those, so that was what we outlined.

THE COURT: Okay.

MR. SHUMAKER: And hopefully that's okay with your

Honor.

THE COURT: Sure.

MR. SHUMAKER: So that's what you'll expect in today's openings. The other issue that I wanted to raise was on Thursday -- I think it's Thursday -- Thursday the city provided to the objectors its witness -- trial witness order list. At the last status conference, I believe you --

THE COURT: Um-hmm.

MR. SHUMAKER: -- expected the objectors to, but no date was set for that, so I wanted to raise that with your Honor as to when you might think that would be appropriate to require.

THE COURT: What do you think?

MR. SHUMAKER: Excuse me.

THE COURT: What do you think?

MR. SHUMAKER: I would say a week from today.

THE COURT: Any objection to that?

MS. QUADROZZI: Your Honor, Jaye Quadrozzi on behalf of Oakland County. I don't necessarily have an objection to that, but as your Honor has heard from us a couple of times, in light of the uncertainty of the presentation of DWSD-type issues, I'm not sure -- if that's resolved a week from today, then I think that we can live with that. If some unclarity still exists a week from today, that's going to make that hard for us.

THE COURT: Well, why don't you assume the status quo and do the best you can by a week from today? And if you have to adjust it later, we'll deal.

MS. QUADROZZI: Thank you, your Honor.

MR. SHUMAKER: Thank you, your Honor. And one thing --

THE COURT: And I wonder if I could have a copy of that list -- that ordered list.

MR. SHUMAKER: Absolutely, your Honor. We'll get that to you.

THE COURT: Oh, Chris says we already have it. Okay. We're all set then. Where is it? Is it here? Oh, way over here. Okay. I do have it, so we're all set. Thank you.

MR. SHUMAKER: Great. And then another issue that I wanted to raise with your Honor is the issue of a sequestration order. The city would like to invoke a sequestration ruling but would also like to designate Kevyn Orr as the party representative for the city. Mr. Orr is going to try to be here as much as he can consistent with obviously other demands, but we'd like to do that, including for opening this afternoon. One issue would be coordination with the U.S. Marshals because we had the issue of the entrance and exit, so I don't mean to complicate things, but perhaps I can just talk to the marshals about how to

accomplish that.

THE COURT: Please. Is there any objection to sequestration and any objection to Mr. Orr being the city's designate?

MR. PEREZ: Your Honor, Alfredo Perez on behalf of FGIC. No objection to the sequestration or Mr. Orr being the designee, but I do want to understand the contours of the sequestration. Generally, it doesn't apply to expert witnesses. I just wanted to make sure that that's the case.

THE COURT: What's the city's position on that question?

MR. SHUMAKER: We agree with that, your Honor.

MR. PEREZ: Thank you, your Honor.

THE COURT: Okay. In connection with sequestration, I have to ask you all to supervise the sequestration because I don't know by face who the witnesses are, and so you'll have to watch for it and supervise this.

MR. SHUMAKER: Then, your Honor, the final item on my list was for the motions in limine argument. I'm not sure how your Honor will want to hear them, but there was a -- there was a good deal of overlap between Syncora and FGIC's filings, and so if you use the FGIC motion in limine about matters deemed irrelevant, that has sort of three basic propositions. One is about the validity of the COPs. The second is about the personal hardship for the pensioners, and

the third is about the terms and conditions of the settlement discussions leading to the grand bargain. And then Syncora has sort of analogs to the latter two, the personal hardship and then also the sort of grand bargain negotiations, so just so your Honor -- how we pieced it up here, Mr. Stewart was going to deal with the validity of the COPs aspect of the FGIC motion. Mr. Hertzberg is going to deal with the personal hardship of the pensioners issue, and then I was going to deal with the grand bargain settlement negotiations. And so I just wanted to alert that to your Honor because if that comes up first, then --

THE COURT: I actually thought that 6982 and 6990, which are the FGIC and Syncora motions you're talking about, should be argued together.

MR. SHUMAKER: Is that the one on mediation, your Honor?

THE COURT: No, no. Those are the two motions you're talking about, Syncora's motion in limine barring the city and plan supporters from introducing evidence regarding the potential personal hardship of pensioners -- that's 6982 -- and 6990, FGIC's motion in limine to preclude the introduction of evidence or testimony regarding certain matters previously deemed irrelevant. Those are related and I thought should be argued together. And you can respond to them however you see fit.

MR. SHUMAKER: Okay. Wonderful.

THE COURT: Similarly, 6979, Syncora's motion, and 6985, FGIC's motion, both relating to the mediation order, should be argued together and responded to together.

MR. SHUMAKER: And the city responded with omnibus responses --

THE COURT: Right.

MR. SHUMAKER: -- to a couple of those as well.

THE COURT: Okay.

MR. SHUMAKER: Thank you, your Honor.

MR. SOTO: Your Honor -- related to that, your Honor, so we've tried to coordinate so that we will not duplicate, and on the first set, the one dealing -- the motion in limine dealing with matters we believe were previously deemed irrelevant, as well as on the mediation one, I will take the lead on behalf of that, and Mr. Hackney will follow.

THE COURT: Okay. Mr. Hackney and then you next, sir. Go ahead.

MR. HACKNEY: Your Honor, good morning. Stephen Hackney. Just a few nuts and bolts for you, your Honor. One was with respect to many of the exhibits we had on our list that were newspaper articles, the city lodged a foundation objection to them, and I asked Mr. Shumaker that to the extent we're going to have a fight about the authenticity of

a newspaper article, I'd like to get it out of the way because the prove-up of that is silly. You know, it's I downloaded it from the state's GTP site and so forth, and so we hope to work that out, but we would like to kind of get through that sooner rather than later so that we know that there's not a problem as to the authenticity of the newspaper articles. I understand they'll reserve their other objections as to how we intend to use them. There is an issue --

THE COURT: Well, and let me just say, as I think I've said before, I want to keep to an absolute minimum any disputes regarding the authentication of any exhibits.

MR. HACKNEY: Heard and understood.

THE COURT: I've said before that true good faith disputes regarding the authentication of documents are extremely rare.

MR. HACKNEY: Understood. Your Honor, there's an issue about deposition video testimony. There are -- there is a desire by us to have the videos themselves become part of the record with the designated testimony.

THE COURT: Um-hmm.

MR. HACKNEY: It turns out that's not as simple as you might expect, and I want to get instruction from you on how you'd like this handled. There are two ways to do it. The first is that you can cut the testimony and do what's

called tuning it with all of the designated testimony and all of the counterdesignated testimony, and we can give that to you. There is a second way to do it, though, which is to wait for you to decide whether you sustained any objections in the testimony and understand that first and then put together final tuned videos based on your rulings. The reason it's important is the process of cutting and tuning a video deposition is very time-consuming and expensive, so the desire is to just do it once, and we wanted to know when you wanted it done, before you've decided or after you've decided.

THE COURT: Is one or the other easier for you?

MR. HACKNEY: It is easier to do it before because we can start now and give it to you, and it will sort of, I would say, be received into evidence with the understanding that any objections that you sustain will be applicable to that part of the video.

THE COURT: Then that's fine with me.

MR. HACKNEY: Okay. And do you want the designated and counterdesignated testimony all cut into one video, or do you want them -- each party to do this separately?

THE COURT: One video.

MR. HACKNEY: Will do. Your Honor, one of the assignments that you've given yourself and fulfilled throughout the case is the role of timekeeper, and I have to

ask you a favor, which is because the counties and others have been working between ourselves to try and allocate time, we actually need you to track time by COPs, counties, and then UAW and DFFA, and that's because of the way we're trying to work together to fit our cases in.

THE COURT: Okay. So are you going to disclose to me how much time each of these parties have been allowed by your agreements?

MR. HACKNEY: Ms. Quadrozzi and I discussed this, your Honor. I knew that you would ask. It's a fair question. Ms. Quadrozzi, I think, has expressed the view that it may tend to reveal some element of strategy if we talk about how much time has been allocated, and I've also --

THE COURT: So you just want me to keep track of how much time is used, and then you'll know --

MR. HACKNEY: Yeah.

THE COURT: -- how close you are running to your --

MR. HACKNEY: Yes, sir.

THE COURT: -- privately agreed upon amount.

MR. HACKNEY: That's right. And in --

THE COURT: Okay. That's fine with me.

MR. HACKNEY: I appreciate it, your Honor. In truth --

THE COURT: I have a -- I'm running an Excel spreadsheet where I just enter the time you start and the

time you stop, and it automatically keeps track of how much time you have used, so I'll just add categories for each of your different parties.

MR. HACKNEY: Yeah. I'm sorry to burden you with that.

THE COURT: And I can -- we ought to try to figure out a way where I can get you that information on a periodic basis, daily or something like that. I can just give you that Excel spreadsheet.

MR. HACKNEY: We'll also try to track it and hopefully can compare. We've also structured this in the spirit of good faith with the notion that if someone's case is running in more trimly than the other, they may be able to help someone who's not, so --

THE COURT: Okay.

MR. HACKNEY: -- we'll work through it, your Honor.

THE COURT: So the parties whose categories you want me to keep track of are?

MR. HACKNEY: COPs, counties --

MS. QUADROZZI: As a group.

MR. HACKNEY: -- as a group, and then I put the UAW and DFFA together consistent with our prior conversation that they would -- there would be a day that was devoted to them, and I think that's likely to play out in a way that works okay.

THE COURT: Okay.

MR. HACKNEY: Your Honor, I wanted to note that you'll recall that the Court permitted a supplemental expert opinion from Ms. Sallee but gave us the right to take her deposition. We haven't been able to do that yet in part because Mr. Smith, who is on point with her, has some of the earliest witnesses in the city's case, including Ms. Sallee. It's our intention to allow him to get through his cross-examinations of her and then pivot to the question of trying to depose her on her supplemental report. That's just in the way of an update.

THE COURT: Okay.

MR. HACKNEY: Your Honor, we filed a motion in limine with respect to what we call the OPEB combination issue, and we were able to reach a stipulation with the city that you entered. Now, when we brought the motion, we were focused on the proponent of the plan, which is to say the city, and so the motion said that the city ought not to be able to introduce this, but now there have been objections that were filed by the retiree parties and the Retiree Committee saying, well, that's well and good. Maybe the city can't, but we can. And I think this kind of brings this question that you and I talked about once before, which is is it just one case in chief that's coming from the city and, yes, they may call witnesses from a retiree committee, they

may call witnesses from the retiree association, but the city is the proponent of the evidence, and, if so, the stipulation binds the city, and we don't need to discuss it. If we're going to allow the idea that there are supporters of the plan that have their own sort of case in chief where they put in evidence, then I note it because I think that we then have to argue the OPEB combination point today as a live controversy notwithstanding the stipulation.

THE COURT: Well, it is the Court's intention to allow plan supporters to submit evidence but within the time limit that the Court gave the city. If you think that as a result of that this issue needs to be -- I don't want to say reopened, but argued as between you and some -- one or more of those plan supporters, that's fine. I'm not sure we need to do that today, however.

MR. HACKNEY: Fair point.

THE COURT: I had sort of taken it off of my mental list for today, so perhaps we can find another time to carve out to argue that before it becomes an issue. Is that okay?

MR. HACKNEY: Certainly. I think we can try to get a sense of the plan supporters' witnesses of when it might become relevant. I know you were hoping that we wouldn't have to at least argue the stipulations, but I think we may have to. It is novel to me.

THE COURT: No. If we have to, we have to. That's

all.

MR. HACKNEY: Yeah. Where the proponent is saying that they will stipulate that it's not to be considered, I think it's a little -- gets a little philosophical, but I understand, and we'll look at that and try to understand when it will --

THE COURT: Well, I think that's a point that should be raised in connection with the motion -- the argument in the motion in limine.

MR. HACKNEY: Yeah.

THE COURT: You know, we'll see what interest these people have in arguing this if the city is willing to stipulate.

MR. HACKNEY: Understood. Your Honor, you'll remember that at a prior hearing we discussed this idea that because the UAW and the DFFA have discrete issues that we might try to find a day for them later on. I'm not sure that we have to do that today, but to the extent you wanted to, I wanted to remind you of that concept, that there would be a specific day in the schedule. It may not be the right day today to pick it, but I wanted to raise it as a final pretrial matter.

THE COURT: It struck me that that should happen after the city rests. Does that make sense? And we won't know for quite some time when that might be.

MR. DECHIARA: Your Honor --

THE COURT: But I do want to do that for you.

MR. DECHIARA: Your Honor, Peter DeChiara for the UAW. Yes, indeed, the UAW would request a date certain. We would prefer to know the date sooner rather than later, preferably today, just so we could plan and also the adverse witnesses we're calling, including the --

THE COURT: Right.

MR. DECHIARA: -- executive director of the Detroit Public Library, could plan.

THE COURT: Right.

MR. DECHIARA: But if the Court doesn't believe it's feasible to do that today, we'd like -- you know, we could do that at the end of the city's case, but we'd prefer to have it done today just for planning purposes. And I do have dates I know now that are not good for the UAW, which I could share with the Court.

THE COURT: Okay. Go ahead.

MR. DECHIARA: The dates that are not good for the UAW are September 17th, September 24th through 26th, September 29th, and October 3rd.

THE COURT: Ms. Patek.

MR. DECHIARA: And I did have one other item I'd like to discuss, your Honor.

MS. PATEK: Your Honor, I'm not here today on behalf

of the DFFA, but my latest understanding is that the DFFA intends to rely on their legal objections and as of last report did not intend to participate in the trial. I will confirm that with Mr. Legghio and let Mr. DeChiara and Mr. Hackney know.

THE COURT: Okay. Let us know, too. Sir.

MR. MACK: Yes. Richard Mack again with AFSCME. On that library issue, Judge, we would just request whatever date ends up being selected, the later, the better given the specifics of what's taken place in the discussions to try to resolve the issue outright, so --

THE COURT: Okay.

MR. MACK: Thank you.

THE COURT: What's the city's position on how to schedule this? Do you have a position? Does it matter to you that it's after the conclusion of your case, or do you mind taking a break if the date we choose happens to fall before you're quite done?

MR. SHUMAKER: I mean I think we'd prefer at the conclusion of the case, not to break our, you know, presentation up. I don't know if you set it at a time when the objectors would definitely be on if that would -- if that would work.

THE COURT: Well, can you give us an estimate of when you think it's reasonable to expect your case to be

done?

MR. SHUMAKER: Well, I think we have 79-1/4 hours right now. How much of that is going to be taken up on direct it's very tough to say, but I think that's about two full weeks of time. You know, I would imagine that the city is going to be done -- now you're going to hold me to this, but --

THE COURT: No, no, no, no.

MR. SHUMAKER: -- the fourth week -- the last week of September.

THE COURT: The only thing I'm holding you to is the number of hours.

MR. SHUMAKER: The last week of September or the first week of October would be a guess --

THE COURT: All right.

MR. SHUMAKER: -- as I stand here.

THE COURT: All right. Thank you.

MR. DECHIARA: Your Honor, the UAW has no problem waiting until after the city has completed its case, so if the Court chose to, for example, choose a day after the last week of September, excluding the dates that I mentioned, that's fine with the UAW.

THE COURT: All right. Let's see if we can just do that right now, sir. Stand by. Can we shoot for Monday, the 22nd?

MR. DECHIARA: Of September?

THE COURT: Yes.

MR. DECHIARA: Yes. That should be fine.

THE COURT: Is that okay?

MR. SHUMAKER: Your Honor, I believe we'll be done by then. I can't promise it. Perhaps a week out if it looks like we're not close enough, perhaps we could alert you to that fact and perhaps revisit whether that's a good day.

THE COURT: You know, I'd rather give them a more certain date now. A week later is the 29th, but that's not an available date, so how about September 30th?

MR. SHUMAKER: That would be good, your Honor.

MR. DECHIARA: That's fine.

THE COURT: All right. Chris, let's somehow make a note of that on our calendar as well.

MR. DECHIARA: Your Honor, just on a different housekeeping matter, this concerns the city's motion in limine to preclude the testimony of Evan Miller, who is a Jones Day attorney that the UAW may call as part of its case, although it may not. We would propose to the Court that rather than hearing argument and having a resolution of that motion now that the Court put that off until after the city's case since by then, "A," the UAW may have settled and be out of the case or, "B," the UAW may have -- even if it hasn't settled, may have decided not to call Mr. Miller, so by the

time the city's case is done, that motion may be moot, so we believe it would be more efficient to put off the resolution and argument of that motion.

THE COURT: Mr. Hertzberg.

MR. HERTZBERG: Yes, your Honor. Robert Hertzberg, Pepper Hamilton. A little surprised that we're arguing this. We had a discussion, myself and counsel, that he would argue it during the hearing on the motion in limine, but he brought it up anyways, but to address it, Mr. Miller is a critical part of the team. He's dealing with --

THE COURT: We're not arguing the motion now. The question is whether to argue it in a little while or later after the UAW determines that they actually want to call the guy.

MR. HERTZBERG: Okay. Let me start again. Mr. Miller is a critical part of the team. He would be subject to sequestration as a witness, so we need to decide it today. We don't believe there's a basis to call Mr. Miller, but he's part of the pension and OPEB part of the case. He's a critical part of the case.

THE COURT: So you oppose putting it off?

MR. HERTZBERG: Absolutely, your Honor.

THE COURT: Okay.

MR. DECHIARA: Your Honor, we would waive sequestration of Mr. Miller.

THE COURT: Does that solve your problem?

MR. HERTZBERG: No. We still want to deal with it today, your Honor.

THE COURT: Why?

MR. HERTZBERG: Because it's important to know whether Mr. Miller is going to be called as a witness before the Court. As I indicated to the Court, he's a critical part of the case. There is absolutely no basis to have him called as --

THE COURT: Now you're arguing the merits.

MR. HERTZBERG: I want the opportunity to argue the merits because there's no basis, and I'd like the Court to decide.

THE COURT: You'll get an opportunity to argue the merits when I say so, Mr. Hertzberg.

MR. HERTZBERG: I understand, but you asked me whether I would agree to an adjournment.

THE COURT: And I'm asking you why not.

MR. HERTZBERG: Because I think it's critical that it be decided.

THE COURT: How would an uncertainty regarding whether he'll be a witness impact his participation in the city's presentation of its case?

MR. HERTZBERG: The uncertainty is that if there's no basis for the motion, it should be dealt with on the front

end of the case. I don't know why we can't deal with it. I know the Court was prepared to deal with it today because the Court put it on its schedule. There's no basis to push it off. There's no basis for it going --

THE COURT: The argued basis is that it's premature until the decision is made that he will be a witness.

MR. HERTZBERG: Well, they've already decided to list him as a will call witness. We filed a motion in limine --

THE COURT: Oh, I thought it was may call.

MR. HERTZBERG: May call. And we decided to file a motion in limine. The Court felt it was correct to have a hearing on the motion in limine. The Court set it for hearing today, and we think it's appropriate that the Court hear it today. There's no reason Mr. Miller should be left under the cloud of whether he's going to be a witness -- an attorney and a witness or just an attorney for the city.

THE COURT: And why is that a cloud?

MR. HERTZBERG: I mean, your Honor, if he's got to be a witness, we've got to then prepare as if he's going to be a witness and get him prepared to be put on the stand. That's got to take place while he's preparing his case dealing with the pensioners, dealing with the OPEB issues, and then also preparing to be on the stand. It's not fair.

THE COURT: Give me one second, please.

MR. HERTZBERG: Sure.

THE COURT: All right. Counsel, please approach the lectern again. I'm looking at the response to the motion in limine. It says, "UAW will be unable to make a more definite determination as to whether to call Mr. Miller, however, until after it reviews the city's response to the UAW's supplemental objection to confirmation of its plan of adjustment. It's due on August 27th." Did you get that response, and why -- if so, why can't you make this determination now?

MR. DECHIARA: Yes, your Honor, we did get the response. The city's position in that brief was very minimal. There was really no factual assertions. It was really legal argument. The reason we'd like to wait to see what comes in on the city's case is to see whether any of the city's witnesses either on direct or cross testify in a way that may make it unnecessary for us to call Mr. Miller, so it's true we did when we wrote that --

THE COURT: That's not what your response says here.

MR. DECHIARA: That's true, your Honor, and we did hope when we wrote that to be able to make that determination after seeing the city's pretrial brief, but having seen it, that did not resolve for us our decision about whether to call Mr. Miller.

THE COURT: On balance, I think it is appropriate to

hear and attempt to resolve the motion today even though there is some uncertainty about whether he will actually be called, so we'll keep it on the list for today. Anything else in the context of our final pretrial conference? Yes, sir.

MR. HACKNEY: Yes. Just one final issue, your Honor, and that is we'd like to raise an issue that came up with respect to Mr. Cline's testimony that the Court already took, and what you'll remember is that when he was testifying about Exhibits 546 and 547, he was talking about the idea that he had used seasonally adjusted employment data, and he was relatively adamant about it. And, in fact, when Mr. Smith attempted to cross-examine him with charts that showed that if you put in the most recent data, the gap between the city and the state is narrowing, Mr. Cline said that's not an apples to apples comparison because I used seasonably adjusted data, and that's from the BLS website, and that is not seasonably adjusted data. But after the hearing, Mr. Smith went to work to try to piece this together and determined that Mr. Cline was mistaken, that this was apples to apples comparisons. The data from the BLS website that both of the exhibits were based on is not seasonally adjusted. And so we reached out to the city and clarified this all out, and obviously there's some chagrin on our part because we'd have liked to have cross-examined him at the

time about this, but at a bare minimum we've said to the city we would like these two exhibits entered into evidence, and they have agreed, and so I would like to ask the Court to admit Exhibits 4543, Syncora Exhibit 4543 and 4651, and I have copies to the extent they're needed.

MR. STEWART: No objection, your Honor.

THE COURT: All right. They are admitted.

(Syncora Exhibits 4543 and 4651 received at 10:34 a.m.)

MR. HACKNEY: Thank you very much, your Honor.

MR. HOWELL: Thank you, your Honor. Again, Steven G. Howell on behalf of the state. Your Honor, I just want to advise the Court that the state will be waiving opening but will be making closing arguments, and we've made arrangements with the city to do so. So that the Court is alerted to that, that's what we intend to do.

THE COURT: All right. Thank you.

MR. HOWELL: Thank you.

MS. PATEK: Your Honor, again, Barbara Patek for the DPOA. One very minor point with respect to, as the Court is aware, the DPOA came late to the supporters' side of the table. The city, through the corrected amended final pretrial order, did get all of our information in. We have a single may call witness who is not on the order of witness since he's not in the order of witness. It's not critical, but we've spoken with the city about it, and Mark Diaz,

who's the president of the DPOA, is our single witness.

THE COURT: Okay.

MR. QUINN: John Quinn, your Honor. A couple of questions. The requirement for objectors to file the order in which they intend to call witnesses, will that apply to in pro per objectors?

THE COURT: Will that apply what, sir?

MR. QUINN: To in pro per objectors.

THE COURT: No.

MR. QUINN: Okay. And, secondly, the Court has previously indicated that it does not want post-trial briefs, but it wants everyone to present their positions post-trial by means of oral argument. Will you want that from the in pro per objectors if we choose to do it?

THE COURT: If you request it, we can make an accommodation for that.

MR. QUINN: All right. And at what point would you like the request?

THE COURT: Whenever it's convenient for you.

MR. QUINN: Thank you, your Honor.

THE COURT: Anyone else have anything to raise? Mr. Gordon.

MR. GORDON: Thank you, your Honor. I was going to wait till later, but I think I'll follow suit with Mr. Howell and just inform the Court that as to when you get to the

point of hopefully today opening statements, the Detroit Retirement Systems expect that the evidence that they may put in is still yet to be determined how we will coordinate with the city. We are playing a supporting role. We expect that our evidence would be subsumed within and consistent with what the city plans to put in as its case in chief, so at this point in time we do not plan to make an opening statement and reserve our comments for closing argument.

THE COURT: Thank you, sir.

MR. GORDON: Thank you.

THE COURT: All right. Can we turn our attention then to the motions in limine? All right. We'll begin with 6978.

MR. SOTO: Good morning, your Honor. Ed Soto again, Weil, Gotshal & Manges, on behalf of FGIC. I'll address FGIC's motion in limine to exclude evidence on certain issues that have previously been deemed irrelevant either by this Court or by the city.

THE COURT: That's actually not the motion that's first on the list, so can I ask you to hold on that one for me?

MR. SOTO: Is it the mediation one?

THE COURT: No. It's not even that one. It's Syncora's motion in limine to preclude debtor from offering evidence relating to, "A," recoveries of Classes 10 and 11

independent of the funds from DIA funding parties and the state and, "B," topics identified in Syncora's subpoenas to the foundations.

MR. HACKNEY: Yeah. This is the one, I think, motion in limine that does not have the level of overlap with what I --

THE COURT: Right.

MR. HACKNEY: -- call FGIC's three-headed monster, so --

THE COURT: Okay.

MR. HACKNEY: So, your Honor, as a procedural matter, let me tell you that I think that this motion is well-suited to a motion in limine, and I think it's a good idea to resolve it now because it's going to have a streamlining effect on the expert testimony that you will see over the coming weeks. And the issue here is when you're doing an unfair discrimination analysis, what it is you count when you're conducting that analysis. And I don't believe that, as the city suggested in its motion, that this is sort of a summary judgment motion in disguise or an attempt like under Lujan, the Sixth Circuit case, to sort of have what is tantamount to a summary judgment-type argument decided in limine. This is actually an attempt to look at the legal standard of relevance and then apply it to a body of evidence that people are proposing to proffer and that we ought to

know now if they should not do that because the evidence is irrelevant, so I think there's a real practical value to resolving the issue now, and I'd like to explain the practical value.

THE COURT: We actually began this conversation the other day.

MR. HACKNEY: Which day was that?

THE COURT: We began the discussion of isn't it important to allow the parties to create their factual records at this level because a court down the line may decide it's relevant to the legal standard it wants or it determines should be applied even if that's different from the standard I think should be applied.

MR. HACKNEY: Well, that is a -- I agree that that's generally a valid concern. Taken to its extreme, you know, it would say that we're going to take 401 out of the case because even if the evidence is not relevant, this party says it is, so we best make as full a record as we can, and that will be considered later. And I think there is some responsibility for the Court, even though it is a bench trial and even though you are someone who is trusted to sift evidence that's relevant and not relevant, so you have, I think, more leeway than you might have in a jury trial. There is still a practical value, I think, especially here where I'm going to -- I'm going to point to things that the

city has done that I think are fairly dispositive on this point, and maybe I can get -- I mean and it will be for you to decide whether, you know, that is sufficiently dispositive on this issue. I do think that this will have the streamlining effect. I don't think I'm going to let the city --

THE COURT: None of us wants a remand because there was insufficient factual development on whatever the standard is that the Court of Appeals or whoever decide should be applied.

MR. HACKNEY: Well, that's fair, but none of us also want a remand because the city is able to, for example, pour in evidence with -- you know, relating to the idea that the unfair discrimination was not as unfair as it appeared only to later learn that it was erroneous to allow them to exclude --

THE COURT: All I can tell you is I hope that that's a straight reversal and not a remand.

MR. HACKNEY: Fair point. Well, let me tell you why I think it's clear enough now that there's value to lancing --

THE COURT: Okay.

MR. HACKNEY: -- this boil, and the first thing, your Honor, is that the disclosure statement itself describes two people that you will be getting 59 cents or 60 cents if

you are in Classes 10 and 11 and that those numbers you can only achieve by reference to the funds that are flowing in as part of the grand bargain, so you already have an action taken by the city as it's going around to describe recoveries to people in connection with soliciting their votes saying this will be your recovery if you approve the plan, and it includes these amounts. That's point one.

Point two is that there is no realistic dispute that the amounts that are coming in via the grand bargain are coming in connection with a plan of adjustment. Even the city does not dispute that. And our view of the law is that that is the relevant consideration that it is -- if it is in connection with a plan, then that is fairly described as a recovery to a party that should be considered. And we have some cases we've cited to you on this notion of gifting and whether they can argue by analogy from gifting in the absolute priority context, and we get into the questions around gifting and whether it's applicable to this situation and whether the doctrine itself is viable. And I think you know the case law on that better than I do, but what I'd like to -- what I'd like to focus on actually is statements that the city has made in its pretrial brief on this subject, so let me read some of these statements to you. In a dismissal scenario, the city obviously would lose access to the $816 million in funds it is due to receive in connection with the

grand bargain. That's from page 81 or paragraph 81. As set forth in the consolidated reply, the city will receive funds with a nominal value of approximately 816 million over the course of the 20-year period following the effective date. That's from paragraph 165. The city is receiving these funds despite the significant dispute discussed in Section 2(c)(1) supra as to whether the city even possesses an interest in the DIA assets that are capable of monetization, thus, as the testimony of the city's witnesses will establish at the confirmation hearing, the consideration the city will receive under the DIA settlement. The statements are replete here, and you can kind of see what happened when you read -- when you read their pretrial brief, which is someone wrote the unfair discrimination section, and they wrote down and said these aren't city funds. They don't count. And then someone wrote the fraudulent transfer section and said look at all the money the city is getting. What they didn't do is put the two things together and say we're not arguing in the alternative here. We're actually taking positions, and we've managed to take positions that are diametrically opposite to one another.

Remember, too, how this dovetails with discovery rulings that you made quashing our subpoenas to the foundations because remember that what we're trying to elicit from the foundations is the idea of who decided on this

structure, who was it that directed the funds to the retirees. Did the city do that? Was that a condition that you all imposed on the city? How did it come about? We weren't allowed to explore that evidence, and so I think when you combine all of these things and think of the way discovery was handled, when you think of the positions the city itself has taken in its disclosure statement, in its plan, in its pretrial brief, that these are monies that the city is receiving in connection with the alienation of its asset -- largest asset and where there isn't a dispute that the alienation of that asset is a condition of receiving all of these monies, whoever gets them, I think it will streamline this trial to say these funds are definitely part of your recovery, Classes 10 and 11, and all of these experts who are going to testify, they ought to take that into consideration as they are preparing their direct examination. If they don't, you get all of these, well, if you count this, it's X, but if you don't count this, it's Y. I think that we should lance this boil and decide today that these are recoveries under the plan just like the city said in its plan and in its disclosure statement, and they count. That's my argument, your Honor.

THE COURT: Thank you.

MR. SHUMAKER: Your Honor, I don't know about you, but that sounds like a legal argument to me. It's on a

substantive legal point, and as we point out in our response to their motion, that really what Syncora is trying to do is eliminate a question of law from the case that's going to be argued off of the facts that are presented. He can point to what he believes are inconsistencies in the city's pretrial brief, but that is argument. That's not precluding some amorphously defined set of documents or some witness testimony. That really is something that you should be doing, I would submit, as the witnesses are being questioned, you know. This is -- you know, this is an argument for later. I mean this is an argument when they can say it was -- there was not sufficient evidence to establish the point. And, you know, we set forth in our papers, you know, we think it's very clear that the monies coming from the foundations and the DIA and the money coming from the state are really not city funds. They just simply are not. If you look at them, you know, as we point out, the facts are simply wrong. The facts are just -- the facts are laid out in part in the documents that are attached to the plan of adjustment, the sixth amended plan of adjustment. You know, with regard to the state funds, which are -- how they are directed is set forth in the state contribution agreement, which is Exhibit I.A.318 of the sixth amended plan. It sets forth what the state is providing money for. It says that the justifications in the House bill are also a matter of record.

The state contribution agreement indicates that the money that the state is going to donate, which is 98,800,000 to GRS and $96 million to PFRS, it states that the state contribution -- Steve, if you could go to page 2 up at the top up there, that first paragraph, you see the first paragraph, your Honor, the last sentence, "State contribution shall only be used to fund payments to holders of GRS pension claims and PFRS pension claims." The House Bill 5575, which is the legislation that the state passed, indicates that there are basically three, you know, important public purposes for the state making the contribution. One, it will improve household income of pensioners, many of whom may reside in other parts of the state, and reduce the likelihood of their seeking public assistance; two, it will facilitate prompt resolution of the City of Detroit's bankruptcy case and save state taxpayers --

THE COURT: I have to ask you to pause for a second --

MR. SHUMAKER: Sure.

THE COURT: -- because it sounds to me like what you are arguing now is that not only should Syncora's motion -- in limine motion be denied but that the Court should find in your favor on the point that the motion raises.

MR. SHUMAKER: If you're accusing me, your Honor, of arguing the merits, that's probably fair. I do --

THE COURT: Yes. I am making that accusation.

MR. SHUMAKER: Yes. I don't mean --

THE COURT: I wouldn't have used the word "accusation," but if you want to accept it, fine.

MR. SHUMAKER: No. But my point, your Honor, is simple, that this is a legal argument that should be made at closing after your Honor hears the evidence that -- from the witnesses and these exhibits are in evidence, so I won't belabor the point and go through it, but as we spell out in the response, it's very clear to us that Syncora has its facts wrong. Now, they'll point to the inconsistencies, but, in fact, we think that it's very clear once you go through that state contribution agreement and the omnibus transaction agreement, which dictates how funds from the DIA and from the foundations flow. So there's that.

And then, again, simply from an evidentiary standpoint, it's really tough to tell what Syncora wants to forbid the city from putting on. Again, I think it's very amorphously defined. It has to do with the combination of recoveries. The reason it's tough to articulate is because it's a legal issue, but, in fact, you know, there's no doubt that there's a lot of evidence that's going to be put on relating to the grand bargain, but -- and there's no doubt that the mediation order will impact what can be presented to your Honor, but at the end of the day, it's very clear that

the result of that mediation is something that the city's witnesses, Mr. Orr and others, are going to need to testify about. And we would submit that that is -- that issues such as, you know, where you divide the line and assertions of the mediation order, that that is something to be done when the witness is on the stand or when we argue whether the exhibit should be put into evidence, and I would submit to your Honor that the Sixth Circuit has been very clear, as it has been in the Sperberg case which we cite in our brief, that, and I quote, "orders in limine which exclude broad categories of evidence should rarely be employed," and we would submit, your Honor, that this is not one of those rare instances.

THE COURT: All right. Any brief rebuttal?

MR. HOWELL: Your Honor, may I? Good morning your Honor. Again, briefly, Steven G. Howell on behalf of the State of Michigan. Just a couple points I'd like to make. We concur with the city, but, in addition, your Honor, there's a couple of factual statements they make in here that they rely on for their motion. One is that the state contribution is in return for the DIA assets. It's consideration for the DIA assets. And that statement is incorrect. State contribution relates to releases from pensioners, from their supporting organizations, and addresses certain litigation that will be disposed of, so that statement is not correct. The second statement -- and

the city has pointed out part of that. That comes up in the plan in Article III.D.7 and Article IV.D.3 and 4. It's in the state contribution agreement in the conditions at paragraph 4, and it's in PA 187, which is the authorizing legislation.

In addition, your Honor, Syncora asserts that the city will receive the state contribution. That statement is also incorrect. The city will not receive state contribution. As was briefly shown up there above the highlighted section is the state contribution is being paid directly to GRS and PFRS in stipulated amounts and is not going to the city, doesn't pass to the city, goes right to the funds, and that also is set forth in the state contribution agreement at paragraph 1, the plan at Article IV.D, and PA 187 at Section 8, subpart 2. So, your Honor, again, not arguing the facts -- I mean the legal argument on the underlying issue but just pointing out that they rely on two statements of fact that are incorrect as it relates to the state, and they lump the state in with a whole lot of their argument about the DIA. And so on that basis, your Honor, we think the Court should --

THE COURT: Well, but your argument raises an extremely complex question about whether the plans are separate entities; right?

MR. HOWELL: Whether the plans --

THE COURT: Are entities -- I'll phrase it more specifically -- are entities separate from the city.

MR. HOWELL: GRS and PFRS, yes. I am making an assumption that they are for this argument, your Honor.

THE COURT: Well, if that's so, why are the retirees creditors of this case at all?

MR. HOWELL: The retirees are creditors of this case.

THE COURT: Why?

MR. HOWELL: Because --

THE COURT: Why do they have claims against the city at all?

MR. HOWELL: Because they have -- in fact, are due sums of money from the city.

THE COURT: By whom?

MR. HOWELL: By the city.

THE COURT: Or the plans. I don't mean to resolve this now or even argue it now, only to suggest to you that this is a very complex question that has to be resolved in the context of this case.

MR. HOWELL: All right. We will address that --

THE COURT: All right.

MR. HOWELL: -- but we believe that it is -- that the distinction needs to be made for purposes of this motion today, your Honor.

THE COURT: I can see that I got some rise in Mr. Bennett's blood pressure here.

MR. MONTGOMERY: Your Honor, we filed an opposition to Mr. Hackney's motion because it relates to evidence that we would propound in this case, and so I just want to make two very brief points. One, on the question of relevance, I think the proper question for the Court is whether or not it addresses a theory of the case that has not been removed or dismissed by your Honor. I think clearly in this context the question of whether or not the noncity funds are excludable from unfair discrimination is a theory of the case which has not been removed. And as the Sperberg case suggests, this is not the right time to remove it.

Second thing I wanted to address very simply is that there was a part of the motion which I'm not sure the city addressed, which was the exclusion of the 30(b)(6) topics that had been propounded to the foundations, and I just wanted to make the point that we, in our response, had identified how Mr. Hackney's client was, in fact, able to conduct discovery in this area and that it remains relevant. Thank you.

Oh, and one last thing, your Honor, the retirees are the ones who received the promise, and, therefore, that's why they are creditors of the city. Thank you.

MR. HACKNEY: So very briefly, your Honor, it is

appropriate, I think, at this time to resolve it for two reasons. You didn't hear a dispute from the city that they presented this as a recovery in the disclosure statement. You didn't hear a dispute that this is money that people will get in connection with a plan. So I think there is a sufficient ground for the Court to say legally, yes, this counts. This is in connection with a plan. That's what the law says. But when Mr. Shumaker says, "Your Honor, we're just going to have a trial on the merits. Then we'll argue it," and doesn't mention the fact that our subpoenas to the foundations were quashed, so we weren't allowed to develop the testimony that said, yeah, this is going from the Kresge Foundation to some escrow controlled by the city for the benefit of the retirees because Kevyn Orr told them he wanted it that way and that in an alternative universe where he hadn't done that, the money might have come into the city and to be ratably distributed, I can't make that case at trial because I wasn't given access to that discovery. And so when Mr. Shumaker says, well, let's just have a trial on the merits, that's when I say this is how it dovetails with our discovery rulings that have happened because I've got one arm tied behind my back. So that's why I think it's appropriate in limine on the threshold of trial to look at the undisputed legal facts, also look at the positions the city took on the foundation charitable -- the charitable foundation subpoenas

where it said we don't see how this is relevant to plan confirmation. I think they have to own the decisions they've made to date, and it will have this beneficial impact on the trial, so I really think it's better resolved now, but that's our argument.

THE COURT: All right. Thank you. I'm going to take this and all of the motions in limine under advisement and give you a decision on all of them when we are finished arguing all of them. So let's turn our attention now to the next one, which is actually the pair of motions, 6979 and 6985, relating to discovery -- or evidence relating to matters withheld on account of the Court's mediation order.

MR. SOTO: Good morning, again, your Honor. So now I'll turn to FGIC's motion in limine to exclude evidence this time relating to matters withheld on the basis of the mediation order.

THE COURT: Okay.

MR. SOTO: As your Honor is, of course, well aware, the mediation order provides that, just quoting it, "all proceedings, discussions, negotiations, and writings incident to mediation shall be privileged and confidential, and shall not be disclosed," and that order was entered on August 13th of 2013. "Incident" is the key word here, your Honor, because when you look up "incident," it means resulting from or likely to happen because of, and so we at FGIC took that

to mean that the mediation order covered anything that resulted from the mediation or was likely to happen because of the mediation. And certainly the city interpreted that to mean something just as broad and just as far-reaching. Indeed, the city shielded a wide variety of information from FGIC on the basis of the mediation order, and we're not saying that the city did anything wrong by doing that. On the contrary, the city was required to strictly comply with the mediation order and all that it provided. The problem is that the city applied a more selective interpretation of the mediation order with respect to certain issues, and it now appears that the city intends to introduce evidence that relates to issues that we think are clearly covered by the mediation order.

THE COURT: Okay. So let's pause there. I'm having difficulty seeing how to deal with this motion on an in limine basis as opposed to a question-by-question basis.

MR. SOTO: And I think as I go through my presentation you'll see why an in limine basis is probably -- and, again, I'm not -- I think I'm not saying the exact same thing that Mr. Hackney said, but there are some instances in which the nature of what was done with respect to the discovery leads to the inability to address certain issues on a case-by-case, issue-by-issue basis, but makes it better to say, okay, if that's what happened here, then maybe all

evidence on that issue ought to be withheld. And that's the nature of our argument, your Honor.

THE COURT: All right. Go for it.

MR. SOTO: And that's despite the fact that the city's application of that order in selective instances did prevent full and complete discovery on several of the same issues they now want to introduce, and so the city has characterized this technique in its papers as walking what they call an admittedly fine line with respect to the mediation order. This fine line we believe is utterly undefined at this point and, in fact, is a moving target. And the city cannot be allowed to use this Court's order as both a sword and a shield, and this flies in the face of well-settled Sixth Circuit law which we address in our briefs and which I will address momentarily. It also flies in the face, we think, of the purpose of the mediation order itself.

Let me give you some concrete examples of the city's broad interpretation and application of the mediation order when it comes to withholding discovery from FGIC and other plan objectors. Discovery was denied based on the mediation order on a host of different topics, including, among other things -- and this is not an exhaustive list, your Honor -- any and all communications between the city and the foundations regarding the grand bargain -- that was applied to stop discovery on that -- how the parties learned of the

grand bargain; why the state contribution was being directed to pensioners; why the foundation contributions were being directed to pensioners; what, if any, claims of pensioners are being resolved through the state's contribution agreement; whether outside the funder -- whether outside funders would have contributed funds absent the transfer of the DIA into a public trust; and whether outside funders would have contributed funds absent the funds being earmarked for pensioners.

Now, your Honor, we're not saying that the city should have violated your order -- I keep going back to that because I understand it's an order -- or that the city's invocation of your order during the depositions was in error. We're not readdressing those issues. We're not, as the Retiree Committee argued in its papers, objecting to the application of the mediation order. In fact, throughout discovery, FGIC cooperated with all parties to avoid violating the protections of the order.

What we are saying, though, is that the city construed and applied the mediation order broadly during discovery, and it is and should be bound by that construction during the confirmation hearing in all respects. In other words, evidence related to any matters that we weren't allowed to fully explore during discovery as a result of the mediation order, including matters on which the city provided

selective but limited discovery, should be excluded in their entirety at the confirmation hearing. Otherwise, FGIC will incur significantly and unfair prejudice. Indeed, there's simply no way for FGIC to adequately address or test arguments whose factual underpinnings it was prevented from learning about and exploring as a result of the mediation order, which goes to my answer to your last question.

And this is not just an abstract concern, your Honor. In fact, based on recent events, there appears to be a very real risk that the city is going to redraw the so-called fine line in an attempt to introduce evidence on issues from which relevant information and facts were previously specifically withheld in discovery. Just one example, and this is something I touched on previously. It's certainly become clear that based on Mr. Orr's testimony and the city's motion to strike Syncora's supplemental objection that the city intends to rely on evidence regarding the intentions, conditions, and reasons for the structure of the grand bargain despite the fact that discovery on that very issue was deemed irrelevant and despite the fact that the city withheld discovery regarding that information, again based on the mediation order. Kevyn Orr, for example, refused to answer questions about whether the foundations ever offered to contribute money without insisting on a transfer of the DIA assets.

THE COURT: Why is that relevant?

MR. SOTO: And I'll go to that issue -- well, let me just address it right now. Okay. It's relevant, as is the question of, well, would the foundations have contributed the money with no strings attached, because as part of the business justification that the city is proffering in its pretrial briefs -- and it mentioned it no less than five times in its motion with respect to Syncora -- they're taking the position that we would not have gotten this money if we didn't -- if it weren't being directed to the pensioners. The foundations, foundations that in many instances have never given to pensioners, would never have given this to the city but for the fact that we gave it to the foundations, foundations that always give money to art issues, but here they would never have given it if the proceeds wouldn't have gone to the foundation. They're saying that's the business justification for why they can discriminate as significantly as they are against, you know, certain classes of creditors, including FGIC, and they're making it a key issue of their business justification argument now, but when we would have asked those very same questions that I'm addressing, particularly the one that, look, you know, would the foundations have given it with no strings attached if they would have known that the art would have been saved, that all of the reinvestment initiatives would have gone forward if

the city in that sense would have gone forward, do they really care about that? Is that something that we could test? We couldn't even begin to test it, and now we're facing arguments, indeed, significant arguments on that very issue. And they intend to put Mr. Orr on, I suspect, to say that very thing, something we could not inquire.

THE COURT: Well, in a bankruptcy case, how would a mediation order ever get reconciled with the proponents' obligation to establish the business justification for the settlement that results from the mediation? How would you propose to do that?

MR. SOTO: Well, your Honor, I actually think there are ways that the mediation order -- I'm not even saying looking back, but you could certainly look back and propose an order that allowed people to inquire into certain areas like the areas that everyone knew -- for example, if the city understood that its business justification for discriminating against our class of creditors was going to be that, well, you know, we wouldn't have been able to get, you know, the money for the grand bargain but for that, then it shouldn't have -- it shouldn't have taken the positions --

THE COURT: But that wasn't even a glimmer in anyone's eye when we did the mediation order.

MR. SOTO: Well, certainly the grand bargain -- the grand bargain has been the issue of much of the questioning

that has been the subject of the mediation --

THE COURT: Right, but we had a mediation order in place at that time, which, by the way, no one ever asked to be amended.

MR. SOTO: Well, I --

THE COURT: My question is a very broad question. How do we reconcile a mediation order in a reorganization case with the plan proponents' obligation to provide business justification for whatever settlements come out of that mediation?

MR. SOTO: I think there are several ways to do it. One would have been for the city, if it knew it was going to take the positions it was going to take -- and it did for some time now -- to be able to say, "You know what, your Honor? We're being asked questions about something we intend to put into evidence. We understand that the law of evidence says if we take the position that it can't be discovered" --

THE COURT: So you're saying the burden was on the city to move to amend the mediation order?

MR. SOTO: Yes. If they understood that this was a position that they were, indeed, not being able to give discovery on something that we couldn't get discovery on but wanted -- and, indeed, the record shows we did try to get discovery on it -- and they intended to rely on it and enter it into evidence, it certainly shouldn't be us who didn't get

the discovery who should pay the price for that burden. And, in fact, we're not even suggesting that -- all we're suggesting is once the city understood what its position was going to be with respect to discriminatory treatment, they were in a better position to understand what their position was than we were.

THE COURT: Probably not any case law on this one way or the other, is there?

MR. SOTO: Right, and there isn't.

THE COURT: Yeah. Okay.

MR. SOTO: So, your Honor, we give the example of Kevyn Orr, which we've discussed. Additionally, Dennis Muchmore, who is the governor's chief of staff, also withheld information on this topic. Mr. Muchmore was instructed by counsel not to answer questions on why the state's contribution would be going to pensioners instead of creditors. The testimony of Rip Rapson, which you've heard a little bit about this morning, who's from the Kresge Foundation, he's the only foundation testimony that the city cites on this topic -- on its opposition to this motion. It's another example of the city using the mediation order, again, as a sword and a shield. Mr. Rapson made public statements about the general bargain in an address at Wayne State University, which was made publicly available to everyone actually on You Tube. He then made contradictory

statements at his deposition, statements which, if the city was applying the mediation order evenhandedly, should clearly have been withheld. But when Mr. Rapson was probed further about the topic, the city objected based on the mediation order and blocked FGIC from obtaining any additional information, information that would have helped shed light on the nature of the differences in Mr. Rapson's statements. And I think it's telling, your Honor, to see it in the perspective that we saw it in, and I would like -- if you have the time, to show you. Here's what we saw when we went on line, if you could play --

THE COURT: Oh, I don't want to see that.

MR. SOTO: You don't?

THE COURT: No.

MR. SOTO: Okay. Then you don't have to, but what you would see is someone extending -- going on and on about things that were important to him and the city, recognizing that Kresge is a wonderful foundation not just for this city but for many cities that have been very important in trying to get urban renewal and so many other issues, and he talks about the ideas that were given to him about how that could be accomplished. Later in his deposition he talks about, well, we tried to put together some ideas, so were they given to him? Were they his ideas? Would he be willing to do it in any other way? As soon as he was asked if there was any

other way, "In your conversations, did you think that there was another way you could have done this?" it was stopped, and so our position in defending ourselves in connection with the discriminatory treatment, the significant discriminatory treatment, and the argument that, well, the business justification is is there's no other way this would have happened, our hands are tied, completely tied. We simply cannot inquire whether there was any other way it would have happened.

Your Honor, the city, in its response to FGIC's motion in limine, claims that the Rapson deposition is an example of the city walking the fine line with respect to the mediation order, but, your Honor, there simply was no consistent fine line. The testimony of Dan Gilbert was similar. That's the other example that's given by the Retiree Committees. He's one of the witnesses that both the city and the Retiree Committee rely on on the opposition. It's another example of the inconsistent application of the mediation order. He was allowed to answer selective questions about how the grand bargain was presented to him, on the one hand, in fact, in the one and only meeting he ever had on the issue, but in that same deposition when we tried to ask, well, what would you have done if it had been presented a different way, would you have done the situation -- would you -- you know, and would you have given

the money if you knew that you could revitalize the city and save the art regardless of what happened to pensioners, would you have -- these are things that go right to the heart of the position that the city is now taking, that but for the way it was structured and the money going to the pensioners, they wouldn't have the grand bargain. And those are issues that handicap us now.

THE COURT: Well, but your argument assumes that the reasonableness of some other plan is before the Court. It's not.

MR. SOTO: Right. Actually, it doesn't. My argument goes to whether or not there is sufficient discovery to allow evidence that but for this money going to the pensioners, it wouldn't have happened.

THE COURT: All right.

MR. SOTO: And that is a critical argument because the law of evidence, which motions in limine go to, Rule 402 and Rule 403, the argument is, well, if it's relevant, okay, we get it, no 402. If it's irrelevant -- and we'll get to that issue when we face the other motions in limine -- well, then, you know, it shouldn't come in anyway. But if it's relevant but highly prejudicial -- and that prejudice can come in many different forms. Here it comes in the form of the result of the city taking the positions that it took during discovery recognizing that it was taking them

during -- as a result of an order. It's not -- I'm not -- they're wonderful lawyers. That's not the point. The point is that we were -- "we" being creditors in this instance, FGIC, were in the least powerful position to change where we are today and to address it. Certainly FGIC will be significantly and unfairly prejudiced if the mediation order is not strictly enforced and the city is allowed to introduce evidence on issues that it previously withheld from discovery on the basis of that order. Prejudice occurs where, like here, a party blocks discovery into purportedly confidential matters prior to the trial but then tries to use information --

THE COURT: I need you to clarify this argument. You say there was nothing improper about any of the assertions of confidentiality that the city made. Is that right?

MR. SOTO: Yeah. What I'm saying is --

THE COURT: Is that right?

MR. SOTO: It depends. There are some. There are one or two where we think --

THE COURT: All right. Mostly.

MR. SHUMAKER: There are one or two where we think they disclosed stuff and we said, "How can you let them disclose that, but then you shut them down?" So I can't say none of them, but -- so, for example, for Dan Gilbert, they

shouldn't have done it.

THE COURT: But where there was a confidentiality claim made --

MR. SOTO: Yeah.

THE COURT: -- there was nothing improper about that. There may have been some situations where they disclosed some things they shouldn't have, but where they did claim confidentiality, it was proper.

MR. SOTO: Right. Under -- they simply applied the order, yes, and the order is the order.

THE COURT: So it's not the city that's blocking your access to that. It's the Court.

MR. SOTO: Right. We're not -- and we're not pointing at the city here.

THE COURT: All right.

MR. SOTO: We're simply saying that the result of the mediation order -- no party should be able to benefit and certainly no one group should be prejudiced by it. It ought to be applied consistently. If we've all been here in these proceedings applying the order and living with the order, while we may have one or two examples where we wish it would have been applied differently, it simply should continue to be applied consistently in connection with the trial. That's our plea.

THE COURT: Okay. All right. Let me ask you to

wrap up, please.

MR. SOTO: Your Honor, we think the relief that FGIC is seeking here, if granted, would result in a uniform and a fair application of the mediation order at the trial, and contrary to the city's assertions, it's not duplicative. It's not unnecessary because those issues are critical to at least one of our objections. We think, contrary to the Retiree Committee's assertions, FGIC does not intend through its mediation -- through this motion to prohibit the admission of what they generally describe as "any evidence," in quotes. That's not what we're seeking. In fact, the evidence cited by the committee that is relevant to the grand bargain, various iterations of the plan, the disclosure statement, they wouldn't be affected by the consistent application of the mediation order. Rather, the relief requested is directed solely at evidence that FGIC has been unable to fully discover as a result of the order. Thank you, your Honor.

THE COURT: Thank you. Mr. Hackney, did you want to supplement that?

MR. HACKNEY: I want to be brief and hopefully not repetitive. Your Honor, the focus for me here is very much the state of mind evidence that Mr. Soto was just talking about. Now, the city says in its brief, "To be crystal clear, information that was previously withheld on the basis

of the mediation order will not be introduced at the confirmation hearing." That's from their response.

THE COURT: Right.

MR. HACKNEY: It is a fact that I asked Mr. Orr or attempted to explore what his state of mind was based on the communications that he had as part of the grand bargain. To confirm, he would not tell me that because asking him about his state of mind would tend to reveal the underlying communication.

THE COURT: What was the state of mind question specifically or approximately?

MR. HACKNEY: About whether he believed the foundations would contribute -- I don't have the text in front --

THE COURT: Yeah.

MR. HACKNEY: -- of me, but the --

THE COURT: Approximately.

MR. HACKNEY: -- line of questioning would have gone to was there another way to do this, right, because the argument by the city is it was my state of mind. My business justification for the cornerstone of the plan is that there was no other way to do this. And so my questioning is if I ask you questions, Mr. Orr, about whether it could have done -- approach --

THE COURT: I'm just a little confused about the

language state of mind because I don't equate state of mind with business justification. In fact, to me they are two very different things.

MR. HACKNEY: I think they are related concepts in the sense that the business justification speaks both to a subjective and objective concept. It has to be subjective in the sense that you must show that it actually was something that you attempted to formulate and decide upon, and also it must be objectively reasonable in that it must satisfy the Court that your business justification --

THE COURT: Well, but isn't the former established in the agreement that the Court is asked to approve?

MR. HACKNEY: No, no, because the question is going to whether there were alternatives, whether there were --

THE COURT: Why is that relevant?

MR. HACKNEY: It's relevant to good faith. It's relevant to unfair discrimination. It's relevant to the entire -- it's relevant to fair and equitable. There's nothing it's not relevant to. This is the cornerstone of the plan. They are going to come in here and say we believe there was no other way to do this, and when there is a collision course between the basis for your business justification, the statements are all made within the secrecy of the mediation and our ability to discover that, it's a fundamental due process issue. I don't think it's even just

prejudice. This is an issue of due process. And I don't think the --

THE COURT: How do you -- what's your answer to the question Mr. Soto didn't answer?

MR. HACKNEY: On 9019?

THE COURT: No. Well, 9019 --

MR. HACKNEY: When you said how would anyone ever prove it up?

THE COURT: How do you reconcile the mediation order confidentiality provision with every plan proponent or settlement proponent's obligation to establish the justification for it?

MR. HACKNEY: Well, the first point I would say is that you yourself have said in the context when I said to you, "Wait. We saw Kevyn Orr violate the mediation order, and he did it under oath in front of all of us" -- he was describing what was going on during the Christmas Eve mediation. Your response to me was, "I don't listen to any of that. When I'm evaluating a 9019 settlement, I look at the underlying facts and the underlying law. I don't need to know what happened in the settlement negotiations." So point one is there's no problem under Rule 9019 evaluating whether a settlement falls within the range of reasonableness based on the underlying facts. The problem is when they're trying to walk from 9019 to justify, for example, unfair

discrimination on the basis of undisclosed business justifications, then I'm with Mr. Soto. My answer is they have the burden. If they want to attempt to confirm a plan that is based on evidence that's not going to be disclosed to everyone, they either need to find a way to eliminate that prohibition or they need to base their business justification on something that we can all see. But let me turn it around on you, your Honor. It can't be the case that a plan can be confirmed over my objection on the basis of secret evidence I'm never given access to. That's not how we do it. So I would say -- and by the way, there were --

THE COURT: If you don't get access to it, then neither do I, and how can it be confirmed?

MR. HACKNEY: Well, I think that's a tautological statement. That's correct. They are going to now give you the evidence that we haven't been able to test because they're going to say, "I'm not" -- "I've kept" -- "Syncora and FGIC are like the little kid in the schoolyard that you hold down while he's trying to jump up and get at you, and so what I've done is I've held them at bay, and so now they can't test the fact that actually all the foundations told me that they were really just focused on the art. They just wanted to preserve the art collection. I was the one that told them that we wanted the money to go to the retirees. FGIC and Syncora can't get those admissions, but then I'm

going to come in at trial and say, 'Your Honor, it's the case that these foundations are the ones that required it. It's not my doing. It's the foundations.'" It goes to the heart of the case, and so that's the basis for the concern.

THE COURT: All right. Thank you. Let me hear from the city.

MR. SHUMAKER: Your Honor, I think you're hitting the nail on the head as to how this process should work. The city is not looking to put in evidence of what happened in the mediation. Of course, it's not going to do that. What it is going to put into evidence is what came out of the mediation process, and what Mr. --

THE COURT: Well, let's just pause there and ask this direct question which Mr. Soto and Mr. Hackney raise, is Mr. Orr going to be asked to testify that part of his business justification for agreeing to the grand bargain was that the foundations wouldn't do it any other way?

MR. SHUMAKER: Well, he -- there is evidence that that is the case coming out of the process. For example --

THE COURT: I need an answer to my question.

MR. SHUMAKER: Is he going to testify about what the --

THE COURT: Is he going to be asked to testify that part of his justification for agreeing to the grand bargain was that the foundations wouldn't do it any other way? They

would only give money if it was going to the pensions.

MR. SHUMAKER: No. He's going to testify that what came out of the mediation process was the grand bargain, and the money that was coming from the state --

THE COURT: So the answer to my question is, no, he's not going to testify to that.

MR. SHUMAKER: That's right. That's right. And that's where a lot of the issues that Mr. Soto and Mr. Hackney describe came up because if you look carefully at the testimony in those depositions of Mr. Orr, they're not focused on, okay, let's talk about the grand bargain as it came out of the process. Instead they repeatedly go in what happened in those negotiations, what did you say to the foundations. If you look at Mr. Orr's deposition, pages 203 to 211, it talks about -- there's the complaint that Mr. Soto raises, what about the foundations, what were your back and forth, how am I going to test this process. Mr. Orr also testifies that every single communication, conversation he had with the foundations except for a couple, "Hello there, how are you?" conversations was in the context of the mediation, and, therefore, that's why the objections were asserted, and that's why there wasn't -- there isn't any exploration of the back and forth. The back and forth doesn't matter. The result matters. The result matters, that there is a mediation, that the parties were represented

by sophisticated counsel, that they were hard-fought, arm's length negotiations. That's what the city is going to rely upon but not who proposed what and here's this counterproposal.

And as for -- you know, I think Mr. Soto -- I appreciate the compliment because it was not an easy thing to do, but all of the counsel representing witnesses in the depositions tried to toe the line. We were very aware of what the mediation order said and what your Honor's dictate was. In fact, the city had been sanctioned for inadvertently producing documents covered by the mediation order, so were we sensitive about it? Sure. Did it come up quite a bit? Sure, because a lot of things got sent to mediation, COPs, UTGOs, LTGOs, collective bargaining agreements, practically everything in this case, so the notion that it got raised in a lot of different contexts just reflects the fact that the mediation order was in place, that parties were sent to it on a lot of different issues, and it worked properly. And so, you know, what I think it's pretty clear here is that Syncora and FGIC want to penalize the city for compliance. This is not sword and shield. We're not selectively out there asserting the privilege and then saying, "Oh, no, you can't" -- this is not the Arista case that Syncora cites where part of our case is going to be the advice of counsel, but, no, you can't have the advice. That's not this

situation at all. And if your Honor goes and looks at those depositions, looks at that testimony, you'll see the counsel trying to be very, very clear with the questioner. You can ask questions about this area, about the conversations with the foundations, but you can't get in the mediation door. Who said what to whom doesn't matter. And what they want to do now is shut things off and say, "Oh, anything relating to the mediation order, we're somehow prejudiced." The case is what the case is. The result of that mediation is what is going to be presented to the Court. Mr. Orr and others will testify about that. So sort of the notion of state of mind that Mr. Hackney is talking about, state of mind was in the context of mediation. That's what he's testified -- that's what he's being asked to testify about. Well, of course, his state of mind in the -- during the mediation is going to reflect what's going on in the mediation, so to us this is -- you see there was no shutting down of evidence. If you look carefully at that, I think you'll agree that this was very carefully policed by counsel. You know, for example, Mr. Rapson -- you know, Mr. Soto makes a big deal of what he said at Wayne State. If you look at that deposition, your Honor, I asserted the privilege, and what I said to Mr. McCarthy in the deposition was, "Look, I understand that he made some public statements. If you want to ask him about those public statements -- about the public statement, fine, but you

cannot ask him about the back and forth with Judge Rosen." That is a clear violation of the mediation order, and we're not going to go there. So, again, this is something which we think they were able to test around the contours of the mediation order, and how you reconcile, you know, what -- you know, the mediation order with the plan proponents' need to deal with what came out I think is exactly what we're going to do. This is what the plan says. This is what Mr. Orr thinks about it. This is what he weighed when it was presented to him and it looked like all of the money was going to the pensioners as part of the deal, and he'll testify why he thought that was a good thing to enter into that settlement. We don't think a sweeping order is appropriate, your Honor, and we would agree that this is best done on a question-by-question basis to the extent it concerns the Court. Thank you, your Honor.

THE COURT: All right. Let's move on and talk about motions at Docket Numbers 6982 and 6990 relating to hardship and matters deemed irrelevant.

MR. SOTO: I've only hit that thing three times, Judge, now, and it's not even a half an inch. Again, I'll address FGIC's motion that you just announced, your Honor. Specifically, it's FGIC's contention that the Court should exclude evidence related to the validity or invalidity of the COPs service contracts, evidence related to the alleged

hardships that pensioners may or may not face, and evidence related to the intentions, conditions, or reasons for the structure of the so-called grand bargain settlements. It'll touch a little bit on what we've discussed, and I think I'll be able to even address something that my colleague here suggested as well, Mr. Shumaker. Thanks. I can barely remember my own name now, your Honor.

Let me say at the outset that because these issues were previously deemed irrelevant, FGIC has either been denied discovery or under the agreement of the parties has withdrawn discovery requests with respect to each of these, and so the introduction of evidence on these issues at this juncture we believe will significantly prejudice FGIC.

First, I'll address evidence relating to the validity of the COPs contracts. As your Honor is aware, the city has commenced an adversary proceeding alleging that certain service contracts related to the certificates of participation are invalid and unenforceable, and, as you know, that adversary proceeding is separate from the plan confirmation hearing we're here on today, and it's still in its initial stages. And the city has readily acknowledged in the past and, in fact, represented at the May 28th, 2014, hearing that evidence regarding the validity or invalidity of the COPs service contracts would not be introduced at the confirmation hearing because, again, it's irrelevant as to

whether the plan should be confirmed.

Your Honor, you also made it clear to the parties at that same hearing on May 28 that the only way evidence relating to the validity of the COPs transactions might come in the confirmation hearing is if the parties open the door to it. Based on the city's representations and your Honor's instructions, FGIC, the city, Syncora, Deutsche Bank, Dexia, and Wilmington Trust, as the contract administrator, all agreed to a stipulation relating to evidence that related to the COPs transactions, and pursuant to that stipulation, the parties agreed not to call six witnesses at the confirmation hearing who could testify to issues regarding the validity of the COPs transactions. They also agreed to withdraw related subpoenas because the issues they addressed were reserved, we thought, for the adversary proceeding. But after the parties negotiated and agreed on the stipulation and after the Court approved it, again, Kevyn Orr, the city's emergency manager, testified at his deposition on July 22nd of this year that one of the reasons for the plan's discrimination against Class 9 creditors -- and, again, FGIC is a member of that class -- is, and I'm quoting here, "the legal arguments that have been made in the papers regarding the COPs that we believe they are void ab initio and that we have no obligation," end quote. That's from Mr. Orr's deposition, page 23 and leading onto page 224 -- 223 to 224. The

Retirement Systems made a similar argument in their brief in support of the plan. Despite Mr. Orr's testimony, the city, nevertheless, asserts in its opposition to this motion that it agrees that evidence as to the validity of the COPs service contracts is irrelevant and that it does not intend to introduce such evidence at the confirmation hearing, but at the same time, the city argues that information related to the validity of the COPs service contracts should be allowed in the confirmation hearing for three reasons. First, the city argues that it wants to bring in evidence that it relied on the purported invalidity of the COPs service contracts in formulating the plan. Second, the city argues that FGIC, through one of its expert reports, has reopened -- has opened the door to validity issues by including a potential disgorgement claim against the Retirement Systems in its feasibility analysis. And, third, the city argues that FGIC has opened the door to validity issues by challenging the amounts of the disputed COP claim reserves, a reserve that is premised on the allowance and validity of FGIC's claims.

As to the first argument, your Honor, the city's position that it wants to introduce evidence that it relied on the purported COPS invalidity in discriminating against Class 9 is filled with contradiction, and let me not characterize the city's argument. Here is their position as you read it. One of the reasons that claims were given the

treatment they were given under the plan is, and I'm quoting, quote, "necessarily the city's views of the strength of its claims that the COPs transaction was illegal and, thus, that the COPs have no right to make a claim at all," end quote. But, in fact, that argument flies in the face of its own plan of adjustment, which is predicated on the very assumption that the COPs service contracts are valid and that the COPs claims will be allowed in full. Your Honor, the city can't -- and I say this a little differently -- eat its cake and have it, too. They decided to submit a plan that assumes the validity of the COPs claims. Arguing in support of the same plan that they have a right to discriminate against the COPs holders because the assumed valid contracts are actually invalid tries to get in the back door exactly what this Court and the parties agreed wouldn't be part of this confirmation hearing. Contrary to what the city argues in its position, both the city's waffling position and the Retiree Committee's position make it clear that FGIC's motion on this issue is necessary at this juncture.

The city and other plan supporters should not be permitted to introduce evidence on this issue at the confirmation hearing for at least two reasons, your Honor. First, as I said earlier, the terms of the plan are neutral on the validity of the COPs service contracts. As the city itself represented to this Court, the plan, quote, "assumes

that at the end of the day the COPs claims are allowed in full." For purposes of confirmation, the COPs are assumed to be allowed -- to be an allowed claim. That's at the May 28th hearing at the transcript on page 231, your Honor. It's clear then that based on the city's own statements, evidence relating to the alleged invalidity of the COPs claims has no bearing on whether the plan should be confirmed. That means this evidence is irrelevant, and, therefore, it's inadmissible under Rule 402, which provides that irrelevant evidence is not admissible.

And just so I'm clear on this point, your Honor, what we're facing is a party standing here saying the plan assumes the validity of the contracts, and for purposes of this trial, the COPs claims will be presumed to be allowed in full while at the same time they're saying that the plan fairly discriminates against us because the contracts are invalid and we should have a right to say so. And that's in the face of prior representations that this very issue wouldn't be brought up, which led us to forego discovery on the issue, and that's the core of the problem that we're facing with the city's position on this one, your Honor.

That leads to my second point, which is that FGIC will be significantly prejudiced if the city is allowed to introduce evidence at the confirmation hearing of this nature.

MR. SHUMAKER: Your Honor, I don't mean to interrupt, but we had -- would you like to hear the response to the COPs validity now or at the end?

THE COURT: At the end. Thank you.

MR. SHUMAKER: Okay. I'm sorry. Either way. I'm sorry.

THE COURT: Yeah. Go ahead, sir.

MR. SOTO: Okay. Okay. We think we'd be significantly prejudiced. FGIC previously agreed to withdraw discovery and potential witnesses on this issue based on the city's representations that the validity of the COPs service contracts was irrelevant. As a result of that process, which was agreed to by the parties, FGIC is not and could not be adequately prepared to present evidence and testimony regarding the validity of those transactions in these proceedings. The case law which is stated in our briefs makes it clear that where a party didn't have the opportunity for discovery on a certain matter because discovery process agreed to by the parties, then that matter should not be introduced into evidence. This reasoning is particularly compelling here because the city actually affirmatively stated on the record that it didn't plan to address those issues.

I'd like to briefly address two additional arguments, your Honor, that the city raises in connection

with this issue. One is that they say FGIC placed the merits of the COPs service contracts at issue in Mr. Stephen Spencer's testimony or report where he raises -- on the issue of feasibility, has the city considered the possibility of a disgorgement. We're not asking the Court to decide the issue of validity during the confirmation hearing, and Stephen Spencer's expert report simply includes an analysis of plan feasibility in that scenario. Mr. Spencer's opinion did not take into account the merits of the adversary proceedings and can be fully addressed without reaching the merits of the proceedings. The city has already had the opportunity to depose Mr. Spencer and it'll have the opportunity to cross-examine him at his trial, something that can't be said about the witnesses that FGIC and Syncora did not have the opportunity to take testimony from. Mr. Spencer's report simply acknowledges that this litigation exists and that if it does, it may have some impact. Nothing is new about that. Everybody understood that that was a potential occurrence. What is new is the city's contention that to respond to this argument it needs to address the merits or, you know, the validity or invalidity of those agreements.

Indeed, your Honor, Mr. Spencer's analysis doesn't bear on the merits whatsoever, but beyond that, because the city has just now raised it, your Honor, if this Court thinks that somehow Mr. Spencer's addressing that issue in his

report opens the door, as you had suggested at the hearing, then FGIC is absolutely -- has no desire to do that. We don't want to open the door to that, and we would be perfectly willing to withdraw that part of Mr. Spencer's analysis to make it clear that we haven't done that. We would much rather do that than face what we think would be the extreme prejudice of letting this other information in.

Finally, nor has FGIC opened the door by raising the fact that the COPs disputed claims reserve is not big enough. As the city has acknowledged previously, the disputed claims reserve is premised on the assumption that the COPs holders' claims are allowed in full under the plan and are valid, and all Mr. Spencer is saying there is, well, if the city is assuming that FGIC's claim is allowed in full, then the city didn't put enough money in there for us. That's it. That's all that does. Again, that doesn't bear on the merits of whether the COPs service contracts are valid or not. It only goes to how the plan already treats those agreements.

And, your Honor, that's the end of that first one. It's probably the right time for someone if they want to address that one. We can go on to the hardship as well if you want to.

THE COURT: I want to do that.

MR. SOTO: Okay. Turning to the issue then of the alleged hardship of the pensioners, your Honor has indicated

on numerous occasions that the hardship of the creditors, including the pensioners, is not a relevant factor in determining whether the plan should be confirmed. For instance, at the June 26 hearing, you stated from the transcript, "I'm going to say here as unequivocally as I can that as a matter of law, creditors' needs is not an issue when it comes to determining unfair discrimination." That's at the June 26th hearing, the transcript on page 104. You further specified at that hearing that, quote, "The retirees' hardships is not at all relevant to the issue of unfair discrimination or fair and equitable." Again, that's at the June 26 hearing but this time on page 128. You also reiterated the same point just recently at an August 6th hearing. Importantly, counsel for the city affirmatively represented at the June 26th hearing that, quote, "he can affirm that the city is not going to be standing on the personal hardship argument." That was at that same hearing transcript page 104. Accordingly, the plan objectors agreed to withdraw discovery requests related to this issue, and your Honor acknowledged that. Despite the city's representations and your Honor's unequivocal statements, Mr. Orr, nevertheless, testified that the hardships of the pensioners was one of the key reasons the city chose to discriminate against creditors in Class 9 in favor of the pensioners. Listen to this.

(Audio played at 11:47 a.m. as follows:)

"MR. HACKNEY: Isn't it true that in coming to your" --

MR. SOTO: This is Mr. Buckfire.

"MR. HACKNEY: -- opinion that creditors do better under" --

(Audio concluded at 11:47 a.m.)

MR. SOTO: Mr. Orr. Okay. Let me read it then.

"Question: And what was" --

THE COURT: Thank you.

MR. SOTO: Yes.

"Question: And what was your basis for the level of discrimination you proposed at the February 21 plan?

Answer:"

I do it better than he does anyway, Judge.

"Answer: We were looking, we had been admonished I believe by the court on several occasions to be compassionate in our treatment of individuals and retirees.

Question: I want to focus on the process of deciding which creditors get which part of the pie, and I want to understand what information you relied upon in deciding to give pensioners a larger slice of the pie than you gave financial creditors.

Answer: In deciding what we could pay pensioners, there were, I would say, several different factors which really spurred that decision. One was the amount of funds that were in the various pension funds. Two was the obligation to try to take into account the situation of these pensioners."

That's at the Orr deposition taken on July 22nd on page 203 to 204 and again on page 209 to 210. Counsel for the Retirement Systems also recently indicated at the August 6 hearing and in their brief in support of the plan that they intend to rely on this hardship argument in seeking to justify the plan's discrimination. Despite Mr. Orr's testimony, the city now seems to take the position that it does not intend to introduce evidence of the hardship. Rather, it intends only to introduce evidence that Mr. Orr relied on the purported hardship of the retirees in deciding to discriminate against COPs holders.

Your Honor, we would suggest that this is no different from what I said moments ago. Here, too, the city wants to have its cake and eat it. It says that hardship won't come in, but at the same time it wants to be able to say that it relied on hardship in justifying its discrimination against COPs holders. Well, if they're allowed to do that, your Honor, then it's in. Simply put,

the city can't say on the one hand that they're going to be introducing evidence of hardship while on the other hand Mr. Moore -- that they're not going to do it, and then on the other hand Mr. Moore -- Mr. Orr says, "Well, we relied on that evidence," evidence that they don't intend to introduce on a point that they haven't established yet. That's the city talking out of both sides of its mouth. And critically, we haven't had an opportunity to take discovery on that issue either, which bears directly on whether the city -- you know, whether or not the city's reliance on that alleged hardship makes any sense at all. In any event, your Honor, it's clear the other plan supporters also intend to introduce this evidence, so our position here is not mooted. Both the Retirement Systems and the Retirement Committee have argued in their oppositions to FGIC's motion that the evidence is relevant on a macroscopic level and that aggregate hardship of the retirees somehow could, and I quote from their papers, "potentially derail the city's entire reorganization effort," end quote, and, therefore, the evidence bears on the business needs of the city. Your Honor, the city and other plan supporters shouldn't be allowed to introduce any of this hardship evidence at the confirmation hearing. In fact, the case law on this issue confirms your prior rulings that evidence of creditors' needs is irrelevant for purposes of determining whether the plan should be confirmed. As the

Bankruptcy Court for the District of Columbia held in the In re. ARN case, and I quote, "While the Debtors prefer to pay local businesses in full at the expense of banks and other lenders, this treatment is not sanctioned by the Bankruptcy Code. The focus on a particular claim should not be the claimholder, but rather the legal nature of the claim. An unsecured claim is simply that, an unsecured claim."

Your Honor has also indicated in other cases that antipathy toward a creditor, which, by the way, is no different than sympathy for a creditor, is not proper basis for discrimination, and that's in In re. Graphic. There's no reason why this case law isn't equally applicable here, meaning that evidence of the pensioners' hardship is irrelevant. And if it's irrelevant, then, your Honor, it's inadmissible under Rule 402.

Equally important is the fact that because discovery requests related to the pensioners were withdrawn based on the prior rulings of this Court and the city's representations, FGIC and other plan objectors did not seek discovery. On this issue, I would also add that the argument that this evidence somehow bears on the hardship of the city as a whole is directly contradicted by Mr. Orr's testimony regarding how the city gathered that. Mr. Orr testified that in determining that hardship, he considered, and I quote, "individual meetings with individual employees and pensioners

who recount their stories in detail." He went on to say that he met, quote, "with people on the street as well as he heard accounts in their reports." That's an interesting description of anecdotal statements, but it's not macroscopic evidence of the nature that was discussed at the August 6th hearing, your Honor.

Finally, your Honor, I'm done with that, and I'll go on since you've asked me to. On the issue of intentions, conditions, and reasons for the structure of the grand bargain settlements, this was very directly related to the mediation, and I won't repeat what we said there, but I will say that there is a particular problem with this evidence. So, for example, we say that evidence regarding -- and you asked Mr. Shumaker directly on this issue, "Well, you know, would you have given the money but for that?" paraphrasing your question to him, so they use Mr. Rip Rapson's testimony, which, again, is all over the lot depending upon which one you look at, to try to address that, but Mr. Rapson is the only -- the one and only foundation witness that was deposed by any of the objectors, and that's because all of the subpoenas on all of the others were quashed. Indeed, the subpoena as to Kresge was quashed, but Mr. Rapson was listed as an independent and separate witness. And because he was listed as a separate witness and, indeed, he was listed as a witness not even on that issue, not about the grand

bargain -- he was listed as a witness on issues of post-confirmation work within the city because Kresge Foundation has done a number of different programs within the City of Detroit and continues to give on a yearly basis millions of dollars separate and apart from anything we're doing here. So when we took his deposition, we got this one beginning but then couldn't inquire any further. You've heard that story from the last motion that we did. But here the problem is that they take that one statement by Mr. Rapson, who represents one out of fifteen potential foundations, and, frankly, only 15 percent of the money given by the foundations, and they say, well, that shows that none of the foundations would have given to the grand bargain but for the way it was structured, but for the fact that it was going to the pensioners. And, again, I'm not trying to be repetitive, but that was problematic as to Kresge. It's extremely problematic as to the other -- is it 14 -- the other 12 because nobody ever got to ask them anything. We have no idea what their position is, and so our position here is, your Honor, again, since the city has taken the position that that issue is either covered by the mediation order or irrelevant because it just goes to settlement, then it is irrelevant, and then the issue of the fact that they wouldn't have given but for the direction should be addressed in this context as well. Thank you, your Honor.

THE COURT: Let's go back to the issue of retirees before you sit down. Is it FGIC's position here that many or most retirees will not suffer hardship if this plan is not confirmed?

MR. SOTO: Frankly, it's our position that if you look at empirical evidence that we couldn't get from discovery but you can do some research determining what is the structure of the group of retirees, who they are, where they live, what they do, how they compare to other people within Detroit, it's our position that, you know, there's a -- it's all over the lot, so the answer isn't black and white, and it isn't that many. We don't know yet, and, frankly, our point is that we weren't given the opportunity to know either. And so the answer to that is --

THE COURT: So you challenge the city's assertion that many or most retirees will suffer hardship if this plan is not confirmed.

MR. SOTO: Yeah. We challenge --

THE COURT: Is that right, sir? Is that right, sir?

MR. SOTO: We challenge it --

THE COURT: Is that right, sir?

MR. SOTO: Yes. The answer is, yes, we challenge it only on the basis of they have --

THE COURT: All right. I want to hear from Mr. Hackney.

MR. HACKNEY: Your Honor, I'll try and be brief without being repetitive. I just want to explain what's really going on here and then try and identify common ground that will, I hope, focus our debate. What's really going on here is that when we got the reply brief back in the day, it said personal hardship qua personal hardship, not connected to some macroeconomic concept relating to the business of the city, was a basis for the discrimination not only justifying it but also that it was, in fact, a motivating factor behind the decision to discriminate. And Mr. Orr confirmed that testimony in my deposition with him. He confirmed that two of the four bases that he identified were fairly characterized as his compassion for the retirees, for the human dimension, and the city covenant that we had with them, and you'll hear more about this later today. The reason I'm giving you this background is because his testimony was not the sort of newfangled testimony that we're starting to hear out of the retirees. It was just, "I was instructed to be compassionate by the Court. I was admonished by the Court to be compassionate. I exercised my compassion, and that" -- I'm not making this up -- "that factored into my decision to discriminate." What happened, though, in the interim was that the Court held correctly under the law that is not a permissible basis to discriminate between creditors, and so after Mr. Orr gave that testimony, you started getting a

bunch of "oh-oh" from the retiree parties, the Retiree Committee, and the city as people started to figure out wait a second, he just testified that a legally impermissible basis infected his decision to discriminate. Now we're starting to see the change, and so now we're going to try and dress the evidence up and say that's not really what he said. By the way, he was the 30(b)(6) witness on this subject and happens to be the guy who made the decision, so you'd think he'd know.

Here's what I think there's common ground, and here's where I think there's not common ground. There is common ground amongst all of us, I believe, that we will not hear testimony from retirees about the impact of the cuts on them or why it imposes a hardship on them or anecdotes relayed on that subject. I believe even the city concedes that. I also believe we're on common ground that if the city wants --

THE COURT: But pause there. I already got a day of that. What do I do with that? Ignore it?

MR. HACKNEY: Well, I think we typically trust judges in bench trials to be able to sift the relevant and the irrelevant, but this is another scenario where if you are going to hear this testimony, we want to have the ability to cross-examine Mr. Orr on the underlying substance of it, and that's how it links up to discovery.

The second point where there's common ground, your Honor, is if the city wants to come in and say different pension cuts would have had an impact on morale or productivity in the business of the city, I do not believe that that is covered by our personal hardship motion in limine. It has to make those arguments consistent with the evidentiary record and what its 30(b)(6) witnesses say and what its other witnesses say, and I'll leave that for the trial, but I don't think that's covered by what my motion sought to preclude.

It is the third area that is the most important. It is the idea that, oh, well, we're not saying it's personal hardship qua personal hardship. What we really meant was it's personal hardship and its impact on the city either economically or in the form of the city services that may be provided to those of the people that are in need. And you see this in the city's brief where the city uses interesting language. It says the city reasonably could have concluded that maintaining pension benefits was the preferable financial and business alternative to reducing those benefits and being forced to offset those reductions with greater public expenditures on other services. Now, there's a reason that they used the word "could have concluded" because, of course, they actually didn't, and Mr. Orr did not say that this is what the basis for the discrimination was.

The Retirement Systems are also trying to move this argument, so it's if the city is losing its workforce in this manner and cannot provide effective services to residents and businesses -- and listen to this. This is evocative testimony -- or evocative argument. If the streets are lined with impoverished retirees dependent upon public welfare and unable to buy services and properly maintain residential neighborhoods, then it will lose existing businesses and will not be able to attract investment and new business.

Now, what I want to remind the Court of is when you go back to that key engagement that we had where I was seeking discovery under my 30(b)(6) topic, that generated a tremendous hue and cry that Syncora was at the focal point of from people that were outraged as to why we were seeking this information. What we made clear was we only want to know what it is that the city knows on this subject as it is making its decision. If the city has analysis that shows 15 percent of people will be put below the poverty line, that will increase the number of people that seek free water or different types of services from the city. Economic cost X justifies treatment Y for the entire class. You know, it's a difficult argument to make, but we wanted to see if they were going to try to make it. What's the information that you had that you relied upon? That was the colloquy that led Mr. Shumaker to stand up after they had said in their brief it's

entirely irrelevant, we cannot fathom a reason why you would want this information, Syncora, you're a bad person, now they come back in and go, oh, you know what, actually it's at the center of my business justification for discriminating because it turns out the personal hardship of the retirees has an impact on the business of the city. That has an economic impact on me as the city, and that's the justification. I'll prove to you at trial that that's entirely inconsistent with the record. I'll leave that for another day. This argument today is that's not fair. They said personal hardship wasn't in the case. They denied us access to the information that they had on the subject of personal hardship, and they cannot now be heard to say, sorry, it's personal hardship in a different disguise. That is the argument, your Honor.

MR. HERTZBERG: Your Honor, Robert Hertzberg on behalf of the city. I'm going to address the personal hardship issue, and then I'll turn it over to Mr. Stewart, who will address the COPs issue. I think it's important that the Court understand the context in which the personal hardship issue came up. It was pursuant to a 30(b)(6) request issued by Syncora. And what they were trying to get was the individual income and current assets of individual retirees, and that's the context it came up in. And we moved the Court and said that this is not relevant, and they should

not be able to seek this information from the individual retirees. In other words, they shouldn't be able to get what assets do they own currently and, second of all, what their income is and information of that type. And that's how the issue became engaged. And we said to the Court -- and we stand by it -- that we're not going to --

THE COURT: Mr. Hackney says that what was requested was that information only to the extent that the city had it.

MR. HERTZBERG: That's correct, your Honor. And we indicated to the Court at that hearing that we would not introduce -- and we will not introduce evidence of, quote, "personal hardship of the individual retirees." In other words, we're not going to parade up retirees who are going to sit here and testify to the Court of their personal situation, their personal hardship. And based upon that, we indicated to the Court we will not introduce that in evidence.

The Court made it clear, however, that the issue is business justification for the treatment from the debtor's perspective, so what happened is Syncora asked Mr. Orr at his deposition why he did what he did, why did he decide to discriminate in one way on behalf of one group against another, and he said it was the human dimension. Then they asked a series of further questions, and now they're trying to block what Mr. Orr's reasoning was. Mr. Orr is not going

to testify as to what individual hardship the retirees have. What he's going to testify as to is what his thought process was when he came to making decisions on putting the plan together, and one of the thought processes along with several others was the human dimension. That's not what the Court -- or what we agreed with the Court that we would not bring evidence forward on. We said we wouldn't bring evidence forward on the individual retirees, and we're not going to, your Honor.

He said he looked at raw data of pensioners, which he was questioned on by Syncora at his deposition. He can testify to the group of retirees as an aggregate and how it impacted his thought process. He cannot testify that this individual retiree would suffer this hardship. That he cannot, and he will not testify to that.

One second, your Honor. If you look at the standard of Federal Rule of Evidence 401, the standard on evidence is relevancy, and the standard is pretty low. And I'd suggest to the Court in this situation that what Mr. Orr was thinking when he made his decisions is important for the Court to hear. His business justification is important, and this is just one of the things that went into his thought process, the human dimension. There will also be -- as Mr. Hackney indicated, there will be testimony on employee morale, and what I think I understood Mr. Hackney to say is that we can

present testimony. He's not trying to block that testimony by his motion in limine, so I'm not going to address that issue, your Honor, but I think it's clear that what the Court indicated was is that there would be no indication of personal hardship. Mr. Orr is not going to testify as to individuals' personal hardship, just what his thought process was, your Honor.

MR. STEWART: Your Honor, Geoffrey Stewart of Jones Day to deal with that part of the motion in limine relating to proofs about the validity of the COPs transaction. The reason I was gazing off into space is I was thinking of the Greek myth about Hercules and one of his labors, which is itself a wonderful metaphor for all of us. Mr. Hackney referred to the three-headed monster, that Hercules had a monster. Every time he cut its head off, he got two new heads. And I was thinking of that in connection with the COPs argument because there are some new heads here.

What didn't come up in Mr. Soto's argument -- and I'm just going to go right to this -- is that his papers say they intend to educe exactly this testimony, namely that one of the factors Mr. Orr took into account in deciding the treatment of Class 9 was Mr. Orr's view that the COPs claims were -- that the COPs transaction was illegal, and, therefore, the COPs claims not being legal would be -- would have to be dealt with in a certain way. I mention it only

because I'm not so certain why we're arguing this at all in view of the fact that Mr. Soto's brief at paragraph 34 says he intends to offer this exact point. We would offer it for the proposition of explaining what Mr. Orr's reasons were for the treatment of Class 9, and this would be one of many, namely that I didn't think the COPs holders had a valid claim because it's an illegal transaction. That would be it, not I'm going to give you an opinion on why I think it's illegal, not here are the various arguments back and forth, just simply that.

In view of the fact, however, that FGIC intends to educe the exact same testimony, I'm not certain of the purpose of the motion in limine unless it is to say you're not allowed to educe it because we're going to pick it up on cross-examination. Anyhow, one thing that does bear emphasis is we have never planned in this case to get into the merits of that part of the COPs claim, and so that is the beginning, middle, and end of that argument. However, that is where this does turn into the Herculean point I just mentioned.

THE COURT: Well, but stop there.

MR. STEWART: Yeah, um-hmm.

THE COURT: If that was, in fact, one of Mr. Orr's justifications that he concluded -- I'm going to phrase it slightly differently to fit my language --

MR. STEWART: Um-hmm.

THE COURT: -- a substantial likelihood of success on the merits of his assertion that the transaction is illegal --

MR. STEWART: He wasn't that extreme, your Honor, but I understand your point.

THE COURT: In order for that justification to have credibility, wouldn't he have to explain to the Court what his legal analysis or factual premise for that conclusion was, and when he does that, doesn't that open that up in a way that violates the previous agreement not to go there in this hearing?

MR. STEWART: If we ask it in that way, yes, but, frankly, the only question we would ask is please list the things you took into account. His deposition testimony was that he looked at the papers filed in the case, and that was the basis of his opinion. That all having been said, if and when Mr. Soto or FGIC raises this on cross, on redirect I guess I get to go into it because, as your Honor has ruled, the door now has been opened. This is a long way of saying I --

THE COURT: Well, but this motion tests whether he gets to say that on direct in the first place.

MR. STEWART: Correct. It does, but their brief could not be more clear that they intend to educe it on cross. They intend to open up this issue. That is why I'm

puzzled, I think, because then it's just a question --

THE COURT: Well, doesn't it suit your interests to wait and see if that happens, and then if the door is opened, the door is opened?

MR. STEWART: Yeah. If they -- I think we could live with that.

THE COURT: All right. Thank you.

MR. STEWART: The more significant one, though, is one that deals with this expert, Mr. Spencer, and let me -- we have to, I think, walk through the steps of what his opinion is. His opinion goes to feasibility, and his opinion is this plan would not be feasible because of the COPs case, and here is his string of logic. Point one, if the city prevails in the COPs case -- in other words, if it is true it's a meritorious claim -- then FGIC or others similarly situated would be in a position to counterclaim against the city, which they've already done, or to go against the Retirement Systems demanding disgorgement from them of the proceeds of the original COPs deal. And if that happened, the Retirement Systems would thereby be underfunded by just that much money. It would turn back to the city and say, well, now you must pay us more because we're underfunded because of this claim made against us by FGIC.

Now, we have any number of defenses to this. At the highest level, it's peculiar that someone says I'm lucky I

participated in an illegal deal because if it had been legal, I only would have gotten ten cents on the dollar, but because I was so clever to do one that's illegal, I now get a hundred cents. More fundamentally, it violates Michigan law that there is no right of unjust enrichment, no claim for unjust enrichment in the case of someone who loans money illegally to a municipality. And I could go on, but I won't. What I'm trying to point out is if Mr. Spencer does indeed make this argument, he has opened up the can of worms because we would then need to prove why it is not a valid argument, why it would not be grounds to challenge feasibility, and we would be going into this entire nest of issues on the merits of the COPs litigation. This was nothing we raised. It's something they raised. Now, fairly put, it is a rebuttal point. We could hold off on this, and that is just fine by me, but the motion in limine seeks to bar -- and the quote is "any evidence related to the validity of the COPs claims." That's actually what the papers say. They can't offer Mr. Spencer with his expansive opinion that goes to feasibility and say, "But by the way, city, we don't want you offering any evidence relating to the validity of the COPs claims." They can't -- and I know it's the cliche of the day, but that is the sword and shield, your Honor.

Finally -- and then with that I'm done -- they have in filings here challenged the adequacy of the COPs reserve

on the ground it has not taken into account their counterclaims against the city arising from the COPs transaction. Those counterclaims have many theories. One is fraud. The city defrauded them. Others are unjust enrichment and so on. If they are, indeed, going to offer proofs of that, they are, once again, at least opening the door. That doesn't mean when Mr. Orr is on the stand we would necessarily go into it, but, once again, I don't think this broad sweeping motion in limine is appropriate if that's one of the arguments they intend to offer at our trial. Thank you, your Honor.

MR. SHUMAKER: Very quickly on the third head, your Honor, and that is FGIC's request that all parties are precluded from introducing evidence or testimony at the confirmation hearing related to, "C," the terms and conditions of the settlement negotiations leading to the grand bargain to the extent such evidence is introduced for the purpose of demonstrating that the plan meets the requirements for confirmation under Section 1129. I think all the terms and conditions, the back and forth that took place in terms of the settlement negotiations that culminated in the grand bargain is covered by the mediation order, and, of course, we're not going to be putting that in. I don't know what else they are after. You know, Mr. Soto talked about Mr. Rapson. A lot of what I would suggest I've already

argued in connection with the other motion, but he suggested that Mr. Rapson testified about why the Kresge Foundation contributed what it did, and Mr. Rapson did that, but that's, I think, not a terribly controversial point because there are transactional documents that reflect exactly what the DIA and the foundations did in connection with the money. Again, that is the result of the mediation process that is relevant, what got spit out, if you will, from mediation. And part of that was transaction documents that indicate that the DIA and the foundations' money should be directed to Classes 10 and 11. It's explicit in the document, so I'm not sure exactly what they're getting after, but I think that the -- what I argued to you before about the mediation order covers the vast majority of it. Thank you, your Honor.

THE COURT: All right. Would anyone else like to be heard on any of these issues in connection with either of these motions in limine?

MR. GORDON: Thank you, your Honor. Again, for the record, Robert Gordon on behalf of the Detroit Retirement Systems. I wanted to address, if I could, for a moment, the hardship issue. I heartily second Mr. Hertzberg's comments and his efforts to put the Court's statements from the June 26th hearing in their proper context. I think it was being -- it was in the context of a motion to quash a subpoena requesting granular information about individuals'

personal assets and income and things of that nature, and in that context it was agreed that the hardship of individuals was not going to be introduced, and, therefore, the information was not needed. It became at least somewhat -- I don't know I would say clear, but at least I became concerned subsequently based upon Syncora and FGIC's questioning of Mr. Orr in July, quite frankly, that they may be -- have been interpreting what happened at the June 26 hearing differently from what I had heard. Mr. Hackney says hardship qua hardship. I think that the issue isn't hardship qua hardship. It's the question of what was that hardship going to be used for and what hardship data was going to be used. And so at the August 6th hearing before the Court, that is why I raised the question with the Court to make sure that there wouldn't be confusion, and I'm guessing it's kind of tacky to quote yourself, but don't worry, I'm going to quote you, too, your Honor. I asked -- I said to the Court at that time on the record, and I quote, "I just want to make sure that it was clear or understood by all parties that if there is information or an argument to be made as to the impact more broadly on retirees, not just as creditors but more specifically as a part of the entity that we are trying to rehabilitate, that that is relevant and fair game in the context of a Chapter 9," end quote. And your Honor said, among other things, that the issue -- speaking about

hardship, "The issue always is the business justification for the treatment from the debtor's perspective. Now, to the extent that issue encompasses consideration of a hardship, I would leave it to the proponents of the plan to argue and prove that," and I'll end the quote there. I would submit, your Honor, at that point with counsel in the room for Syncora and I believe FGIC as well that it behooved them to step forward if they thought that what was discussed with the Court at that moment was not consistent with their understanding of what evidence was going to be able to be presented or not. And it wasn't raised at that time, and instead a strategic decision was made at that point to instead pursue this motion in limine some three, four weeks later. So what might have been an honest misunderstanding about what did transpire on the June 26th hearing date seems to have turned into something more in the way of a strategy, and I think it would be prejudicial to the city to not be able to introduce this evidence. I don't think there was any intention to eliminate the ability of the city to address the impact on the city, on its retirees, and on its active workforce -- that is part of the city -- of the confirmation or the inability to obtain confirmation of this plan. Thank you, your Honor.

THE COURT: Thank you. All right. I'd like to -- oh, was --

MR. SOTO: If I may for one second --

THE COURT: Well, one second. I think Ms. Patek also wanted to speak in opposition to the motion, and then I will hear you, sir.

MS. PATEK: Your Honor, again, Barbara Patek for the Detroit Police Officers Association. I'll be very brief. But we keep talking about the business judgment idea, and I think we have to remember that we are in Chapter 9, and so while we expect our municipalities to make businesslike and fiscally responsible decisions, to suggest -- I think Mr. Hertzberg hit it right on the mark -- that the human dimension can't be considered I think is simply wrong because at the end of the day, the city has to be able to govern, and I'm speaking here -- I think Mr. Hackney acknowledged that with respect to active employees, they are pensioners, too. They are affected by these cuts, and there's going to be a lot of evidence to deal with that problem, but I think even more importantly this whole macroscopic idea of the city's ability to govern as part of being able to have this plan confirmed --

THE COURT: Can you suggest a phrase better for us to use here than "business justification"?

MS. PATEK: I'll be happy to think about it. I can't come up with one off the top of my head.

THE COURT: If you do, let me know.

MS. PATEK: But I -- you know, it is a business justification, but I think that's a broader concern because if we can't pay the fees --

THE COURT: I agree. It's not a business case. It's a municipal case, but I just can't think of a better phrase. Municipal judgment doesn't sound right either, so I don't know.

MS. PATEK: No, but we can't --

THE COURT: We'll work on it.

MS. PATEK: But the most important piece of it is at the end of the day if we can't pay these people, we can't just say, "Oh, well, let's just divide up the spoils among the creditors and go home," and I guess that's the simplest way I can put it. I don't have a word or a catchphrase for that.

THE COURT: Mr. Soto.

MR. SOTO: First, if I could take the clock back just 15 minutes or so when you had addressed the question to me, and you asked if we challenged whether or not these retirees would suffer, and I think I like the way that -- I think it was either Mr. Shumaker or somebody from this table said, "We're not challenging the fact that individuals are going to be affected." That's -- we get that. What we're concerned about is, in fact, whether or not there's going to be the kind of testimony that Mr. Gordon talked about at the

August 6th hearing and that the Court clarified at the August 6th hearing and that I stood up and asked the Court and the Court clarified again; that is, macroscopic, macroeconomic evidence of the type of hardship that would have been discoverable also by the subpoenas that were quashed because the subpoenas did several things. They did ask for some individual information that would have gone to whether or not individuals were, indeed, doing bad, but they also asked for general information, and I appreciate the way the Court put it, if the city had the general information about, you know, what the impact would be, and so I just wanted to clarify that.

Secondly, on the issue of what it is that Mr. Spencer's feasibility report does or doesn't do, I agree, Mr. Stewart, that, you know, if on rebuttal we stood up and brought the issue up, it would fly squarely in the face of your May 28th admonition to everybody in this courtroom which said if you open it up, then it's here. It's in. It's open. What we're suggesting is that the first step for the Court to do is to see if it's keeping it out altogether. That would keep it out for everyone, including us, and that's why we took the position that if someone thought that the analysis by Mr. Spencer regarding disgorgement -- the disgorgement analysis did that, that we would withdraw it. And I wanted to reiterate that for the Court.

And then finally, with respect to the issue regarding Mr. -- on the settlement issues, again, our position is a little bit different on this one. On the settlement issue, our position is when you have 13 or 14 foundations that are addressed and that are dealing with it and one person from one of those foundations makes an obtuse statement that may or may not have been within the confines of the mediation order, may or may not have should have been withheld one way or another, that that shouldn't be used as the example as the support for opening up this issue with respect to all of those foundations when nobody on the COPs side had an opportunity to take that discovery, and that's all we're saying. And I thank you for your patience.

THE COURT: All right. All right. I'm going to stretch this out here a little bit and ask to conclude our arguments with the issue of Mr. Miller's testimony or being called as a witness, and I'm going to allow each side five minutes, please.

MR. HERTZBERG: Your Honor, Robert Hertzberg on behalf of the city. If you look at our motion -- or if you look at their response to our motion in limine and you look at specifically paragraph 5 of the motion, they indicate that they want to call Mr. Miller for, quote, "discussions with DLC," Detroit Library Commission, "regarding the DLC's pension and OPEB obligations." There was a deposition taken

of a representative of the library, JoAnn Mondowney. I hope I'm pronouncing that right. I'm not sure. And the UAW counsel asked her, if you look at page 77 -- she indicated that they had one phone call on February 24th. And it continues on, and I don't want to burden the Court with reading the deposition, but I think it's important the Court get a sense of Mr. Miller's involvement in what they're trying to elicit from Mr. Miller by bringing him in as a witness. If you look at page -- bottom of page 77, it says,

> "The library's relationship to the city and the fact that the UAW had approached the Jones Day attorneys about the library relationship pension and healthcare.
>
> Question: Okay. Who said what about the library relationship with the city in that phone call?
>
> Answer: We said that the city served the library's fiduciaries, that the city administered our pensions, healthcare, and other post-employment benefits.
>
> Did you and/or Ms. Moore say anything else on that topic?
>
> No.
>
> Do you recall whether Ms. Lennox or Mr. Miller said anything about the topic of the library

relationship with the city?

No.

They didn't say anything? Do you recall that they did not say anything or you don't recall whether they said anything?

Answer: We explained the library's relationship to the city.

Right. And my question is did the two lawyers from Jones Day say anything on the topic?

No.

Was there any discussion by anyone on that phone call about what impact the city's bankruptcy might have on the pension and OPEB library retirees and employees?

Answer: The discussion was basically around all participants and the general retirement and healthcare to the city being subject to modification."

And finally two last questions.

"Was there any specific discussion on how the retirees or employees of the library might be impacted?

Other than as participants, no."

And when asked,

"On what occasion did you speak with them again?

Answer: I have to recall because I can't remember exactly when. I never spoke again to Mr. Miller, but I did speak to Ms. Lennox."

I think it's important that this whole request to have Mr. Miller testify revolves around one phone conversation that they had, which can be fully explained by the witness who was called to the deposition, JoAnn Mondowney. UAW's response is that they -- or the UAW has never responded to and has never shown a compelling need to call Mr. Miller or extraordinary circumstances, which is required when you have an attorney that you're seeking to have testify as a witness. UAW has never indicated why it is relevant, Mr. Miller's testimony. We have this witness who's been deposed who can discuss the conversation, and as I've indicated, I read to you the discussion she had with Mr. Miller, or why they could not get the information from another source; i.e., this witness. The UAW appears to be going to try and elicit testimony from Mr. Miller that it is either subject to the attorney-client privilege or subject to the mediation order.

Finally, there's a three-part test that they have to meet in order to get Mr. Miller's testimony before this Court that the testimony sought is neither privileged or confidential. They haven't addressed that, and you can't tell from their response what they're trying to elicit from

Mr. Miller. They have not indicated how the information is relevant or vital to the case. If you read their response, they've never given any indication why it's relevant or why it's vital. And they cannot present the information -- and why they can't present the information from another source. As I suggested to the Court, the deposition shows the other source.

Based upon that, I believe that Mr. Miller should not be called as a witness; that they have adequate other sources to gather the information from. Thank you, your Honor.

THE COURT: Thank you, sir.

MR. DECHIARA: Peter DeChiara for the UAW. Your Honor, the UAW has reason to believe that Mr. Miller is the most knowledgeable person representing the city concerning pension and OPEB benefits and is knowledgeable, uniquely knowledgeable about how this Chapter 9 case may impact the pensions and OPEB of the library. So, for example, he would be in a position to know whether, contrary to the city's assertions in its papers, whether this -- the plan of adjustment would reduce the library's contributions to the GRS. The city has asserted and insisted that this plan of adjustment would not impact the library's obligations.

THE COURT: But he has that knowledge only in his capacity as a lawyer for the city.

MR. DECHIARA: Well, he's a representative of the city. We do not at all seek any privileged information from him. For example, we don't seek any communications that he, as a lawyer for the city, had with the city.

THE COURT: All right. What's the question you want to ask him?

MR. DECHIARA: We would want to ask him whether or not the -- there are a couple, but one would be whether or not the plan of adjustment would reduce the library's obligations to pay into the GRS. We would want to ask him --

THE COURT: All right. Stop there. I take it by your felt need to ask that question that it isn't clear in the plan itself?

MR. DECHIARA: It's not sufficiently clear. There are documents that suggest that that --

THE COURT: If it's not clear, why isn't that just an objection that has to be dealt with by the city, and why is it necessary to call one of the city's lawyers to ask that question?

MR. DECHIARA: Well, as part of our -- of the UAW's --

THE COURT: There's lots about the plan that may not be clear, but we don't call the city's lawyers as witnesses to ask them what their view is of what the plan's answer to that uncertain question is.

MR. DECHIARA: Well, your Honor, we think it's central and fundamental to the UAW's objection that this plan --

THE COURT: Fair enough, but why is the way to get an answer to the question to call the city's lawyer as a witness?

MR. DECHIARA: Because we think he's the one who has the answer, who is most -- who is best positioned to give the answer to this Court, to make the record on that key point. We don't believe the executive director of the library knows. We don't believe the executive director of the GRS is --

THE COURT: And that may be fair enough, but why is the answer to call him as a witness as opposed to just insist that they respond to the question in the context of responding to your objections?

MR. DECHIARA: Well, I'm not sure I understand, your Honor. We have taken written discovery of the city. We have the city's pretrial brief. What we've gotten were a lot of nonanswers or unclear answers, and we think, as is often the case, to have a live witness who you can question and have a back and forth to really flesh out the answer, and we don't think it's been fleshed out to the extent that it needs to be fleshed out, and that's part of why we're seeking to question Mr. Miller. It would not be an extensive --

THE COURT: Well, that doesn't matter. What's the

other thing you want to know?

MR. DECHIARA: Another example would be why the city needs to cut or why the city perceives it needs to cut --

THE COURT: That's not a question for a lawyer.

MR. DECHIARA: Your Honor, again --

THE COURT: That's a question for the city.

MR. DECHIARA: And, your Honor, Mr. Miller, in our view -- and I don't think the city disputes this -- is the person uniquely knowledgeable about these pension and OPEB issues as relate to the plan and particularly as relate to the library. He's the one who could answer --

THE COURT: But only in his capacity as a lawyer for a client. If the client can't answer that question, then the plan isn't confirmed.

MR. DECHIARA: Your Honor, I believe the way -- the reality is that the city has various representatives. Some are elected officials, some are lawyers for the city, some may be consultants. There's a constant --

THE COURT: Ah, but we in litigation mark the distinction between lawyers and clients very carefully; right?

MR. DECHIARA: I'm sorry, your Honor. Are you asking me a question?

THE COURT: Yeah.

MR. DECHIARA: I'm sorry.

THE COURT: We don't call lawyers to ask them questions about, for example, their clients' claims.

MR. DECHIARA: That's generally true, your Honor, but here we have a situation where Mr. Miller, who is not part of, as I understand it, the litigation team, per se -- he's not the one at this table --

THE COURT: He's still the city's lawyer.

MR. DECHIARA: Well, that may be true, but he's --

THE COURT: It's not may be true. It is true.

MR. DECHIARA: No, no. It's obviously true he's a lawyer for Jones Day, which is counsel for the city. Obviously that's true. But functionally he is -- and in reality he is the one who has the knowledge, who can answer the questions that are key questions to the UAW's case.

THE COURT: And I have to ask what I asked earlier, which is why isn't it sufficient to deal with your concern about that or your objection about that to simply say that if the city itself can't answer that question, the plan won't be confirmed?

MR. DECHIARA: Well, we will argue that, but we're --

THE COURT: We're all set then.

MR. DECHIARA: Well, your Honor, what we'd like to do is make a record, make a factual predicate, so we'd like to bolster whatever legal arguments we have based on written

responses we've gotten from the city with testimony. We don't think the city would be prejudiced by us --

THE COURT: So by your theory Syncora would call Mr. Bennett as a witness to testify why the city needs to discriminate against his client. I don't think so.

MR. DECHIARA: No, and I wasn't --

THE COURT: This trial is long enough as it is. What's the distinction? I can't see a distinction.

MR. DECHIARA: Your Honor, I'm not familiar enough with Mr. Bennett's role to speak to that, but I can speak to Mr. Miller. The UAW has been dealing with Mr. Miller, and he is the one --

THE COURT: Well, all right. All right. Let's assume Mr. Hackney isn't satisfied with Mr. Bennett's answers. Then he calls Mr. Hertzberg, and then he calls Mr. Shumaker. I mean we don't do that.

MR. DECHIARA: Yeah. No.

THE COURT: We just don't do that. It's the city's plan. It's not the lawyer's plan. It's not the lawyer's job to testify in support of the plan. It's the city's job.

MR. DECHIARA: And, your Honor, I agree with you entirely in general; however, in this case the individual who represents the city who has the knowledge to answer the questions that are relevant to the UAW's case happens to be with Jones Day as opposed to in-house with the city or a

consultant to the city or what have you.

THE COURT: If that's true, the city is in trouble. Got it? All right. I'm going to take all of these under advisement, and we will reconvene at ten after two. I will give you a decision on these then, and then we'll start with the opening statements.

MR. STEWART: Thank you, your Honor.

MR. DECHIARA: Thank you, your Honor.

THE COURT: Mr. Hackney has his finger up.

MR. HACKNEY: Just the Buckfire Daubert motion is --

THE COURT: Oh, I forgot that one. Yeah. We need to argue it. We'll come back at ten after two and argue that one, too, yes. Thank you.

THE CLERK: All rise. Court is in recess.

(Recess at 12:42 p.m., until 2:10 p.m.)

THE CLERK: All rise. Court is in session. Please be seated. Recalling Case Number 13-53846, City of Detroit, Michigan.

THE COURT: It appears that all counsel are present. Addressing first the motion at Docket 6978, Syncora's motion in limine to preclude debtor from offering evidence relating to, "A," the recoveries of Classes 10 and 11 independent of the funds from the DIA funding parties and the state, and, "B," the topics identified in Syncora's subpoenas to the foundations. The Court concludes that this motion should be

denied at this time. It is denied, however, without prejudice to Syncora's right to raise any evidentiary objection it sees fit during the trial. The Court agrees with the city that as to Part A of the motion, the motion really requests and would require the Court to resolve an important legal issue in the case at this time, and the Court is not prepared to do that and does not think it would be appropriate to do so. While it certainly would streamline the trial, there's -- the Court concludes that the better course is to allow each party to submit the evidence that is arguably relevant to its view of the law applicable to the case and then for the Court to determine that law and the facts at the conclusion of the case.

As to Part B, which relates to the topics identified in Syncora's subpoenas to the foundations, I can only say that as a general proposition, relevance decisions that are made during discovery apply at trial, but it's hard to grant or even consider this motion in the absence of specific questions to specific witnesses, so this motion will be denied but, as I say, without prejudice to the right of Syncora to object to specific questions on this ground.

The next motion is 6979, Syncora's motion in limine barring the city from introducing communications protected by the Court's mediation order. This is related to 6985, FGIC's motion in limine to preclude introduction of evidence or

testimony regarding matters withheld from discovery on the basis of the mediation order. Once again, the Court concludes that both of these motions should be denied but with this caveat. The Court has enforced and will continue to enforce strictly the confidentiality provision of its mediation order, but, again, how that gets worked out in our trial has to be determined on a question-by-question basis, and to attempt to give any more guidance than that would not be prudent at this time.

Addressing next 6982, Syncora's motion in limine barring the city and plan supporters from introducing evidence regarding the potential personal hardship of pensioners, and 6990, FGIC's motion in limine to preclude the introduction of evidence or testimony regarding certain matters previously deemed irrelevant, the Court has ruled before and maintains now that the impact of confirming the plan on any particular creditor or group of creditors or class of creditors is not relevant to whether the plan should be confirmed, and the Court intends to enforce that ruling on relevance throughout the trial. Having said that, once again, it is difficult in the absence of specific questions to give advice on how that ruling may play out during the trial, so that motion from Syncora and that part of FGIC's motion are denied but, again, without prejudice to their right to object to specific questions on the grounds of lack

of relevance.

FGIC's motion asked to preclude a couple of other matters, one relating to the validity of the COPs claim. Once again, the Court does not see and is willing to see the relevance of the validity of the COPs claim to the issue of whether the plan should be confirmed or not, especially in light of the parties' apparent agreement -- I shouldn't say apparent agreement -- I should just say agreement -- agreement not to permit discovery regarding the validity of the COPs claim in connection with their preparation for this hearing today, and the Court understands that the city does not intend to present any such evidence in its case in chief. In the circumstances, therefore, the Court will deny the motion but, again, without prejudice. To the extent that FGIC seeks some kind of ruling or advice or guidance on how this might affect its decision to question its expert regarding this, the Court is unwilling to give that advice or guidance at this time. FGIC and its counsel should simply decide on its trial strategy however it decides is in its best interest and take into account what the consequences of it might be and endure those consequences.

The final aspect of FGIC's motion 6990 asks the Court to enforce its previous ruling that the negotiations surrounding the grand bargain are irrelevant. In great measure, this is essentially the same motion as enforcing the

mediation order. Nevertheless, the Court has indicated that who said what to whom in connection with the grand bargain or any of the settlements, for that matter, in connection with the plan that the city now seeks the Court to confirm is all irrelevant, but having said that, once again, without having the context of a specific question, it's hard to give a specific ruling, so in the circumstances the Court will deny the motion but, again, without prejudice.

And, finally, with regard to the city's motion in limine to preclude its counsel, Evan Miller, from being called as a trial witness, Docket 7001, the Court concludes that this motion should be granted. The record fails to establish adequate justification for the UAW to call the city's counsel as a witness here, and, accordingly, the motion is granted.

The Court will prepare orders on each of these. Let's turn our attention now then to the two motions that address the testimony of Mr. Buckfire. Those are 6787 and 6826, please.

MR. HACKNEY: Your Honor, before I begin my argument on this Daubert motion, I do think after we're done and before we start openings I would benefit from being able to ask you one question about your ruling on the COPs invalidity point and what constitutes opening the door on that. It will actually affect our opening presentation, so I want to make

sure that I have --

THE COURT: Well, why don't we just get it out of the way now before I forget what the issue was?

MR. HACKNEY: Okay. So the -- I agree and accept and embrace the idea that we're not going to litigate the validity of the COPs in this case. It is a fact, however, that in his 30(b)(6) testimony explaining his discrimination decision, Mr. Orr did say that the invalidity of the COPs was something that factored into that. Our view has been that establishing that fact and then establishing that that's actually inconsistent with the structure of the plan would not be tantamount to opening the door to litigating the underlying merits, but the colloquy that I heard you have with both Soto and Mr. Stewart suggested that I may be wrong in thinking that, and I -- since we don't intend to open the door on this point, I wanted clarity on it before Mr. Kieselstein does his opening and -- because what we do is we lay out what he said and then articulate why we believe the evidence will show that's not a valid basis for discrimination, but we don't want to open the door --

THE COURT: I have to think that if that is the response you raise, that that's not a valid consideration, that doesn't open any doors. What would open a door is if you were to argue, yes, our claim is valid or why did you think it was invalid, all of that.

MR. HACKNEY: Agree. It is for the limited purpose of establishing the inconsistency between taking it into account and the way this plan is structured, not for the purpose of debating the merits.

THE COURT: Okay. I think you're all set.

MR. HACKNEY: That's very helpful.

THE COURT: I think you're all set then.

MR. HACKNEY: Your Honor, with respect to the Buckfire Daubert motion that we filed, it's not my intention to repeat the motion itself. What I'd like to do is rise above a bit and look at the clash you've seen now between the city's brief and ours and give you thoughts on that in a relatively rapid fashion so that we can get to openings. The first point, your Honor, is that I think the first sign of trouble in many respects in the city's brief is that they are asking you to weaken the standard of Rule 702 when they articulate that the gatekeeping function of the Court is not as important in a bench trial as it is in a jury trial, and then they actually say that there is a liberal standard for admission of expert testimony. Now, that is inconsistent with cases that are legion that say that it is actually a requirement of Rule 702 in the Supreme Court's holding in Daubert that trial courts, whether they're administering jury trials or bench trials, rigorously apply Daubert's requirements of a relevant and reliable methodology and good

grounds. And while it is true that in a bench trial you have the discretion to decide the timing of when you will make that decision, it is not true to say that the standards itself are weaker in a bench trial. Rule 702 is Rule 702 in a bench trial or in a jury trial.

The second important framing point I wanted to make, your Honor, is that remember, too, that the burden is on the city to establish the admissibility of its expert testimony. They are the proponent, and so if you pick up the city's brief on this point, you'll find an attack on FGIC and an attack on the way we have articulated what we think Mr. Buckfire should be doing. You don't find an affirmative statement of methodology by the city where the city says here is the methodology. This is why it's relevant. This is why it fits the legal determination. And so I think it's important to remind ourselves it's not the burden of us to establish that it's inadmissible. It is their burden to establish that it is admissible.

Now consider after you have read our two briefs, set them side by side, what are the things that are not disputed between the two of them. It is not disputed that Mr. Buckfire did not conduct a dismissal analysis. It is not disputed that he did not prepare and has not seen a dismissal forecast. It is not disputed that he did not conduct any analysis of increased taxes pursuant to an RJA judgment. It

is not disputed that the person whom he purported to rely on, not disclosed in his reliance materials, but it came up in his deposition, Mr. Cline, also did not conduct any analysis of an RJA judgment and what it would do to revenues. He did not analyze which claims have accelerated, which have not. He did not analyze which agreements survive bankruptcy and which do not. He did not analyze potential asset sales if the case were dismissed. He did not analyze potential cost rationalization if the case were dismissed. In the face of these admissions by the city, the city cannot establish a relevant and reliable methodology. We are talking about an expert report, your Honor, that is three pages long. There are no work papers. The reliance materials portray that he spoke to no witnesses. And remember the question of how creditors would fare if the case were dismissed is a highly complicated, highly disputed one because of the unique attributes of this plan. For example, under this plan, there is significant discrimination between creditors whereas out there in the dismissal world the city concedes recoveries would be pari passu. In a dismissal scenario, the city would still have the DIA art collection and might do something different from it than it is doing in this case, and it could generate monies that were distributed to all creditors, not just to the pensioners, so the question of what happens if we dismiss this bankruptcy case to creditor recoveries is not at

all obvious, and yet Mr. Buckfire did not do the work that would allow him to answer that question. Instead, his opinion can be boiled down to there's a race to the courthouse, and I believe it's obvious that that would be bad for everyone. It is the classic type of ipse dixit opinion that the courts consistently reject.

Now, if you put the problem of methodology to one side, there is a second problem, which is the assumptions that Mr. Buckfire's opinion are based upon were not adequately vetted by Mr. Buckfire. In the city's brief, you see them tearing apart straw men. So they say, for example, Mr. Buckfire assumed rates are at statutory maximums, and, in fact, rates are at statutory maximums. Creditors cannot compel sale of assets. The grand bargain does go away in a dismissal scenario. Yes, those are all assumptions that Mr. Buckfire made that are, in fact, correct. Those aren't the assumptions that we're talking about. We are talking about, number one, his assumption that increasing taxes will erode revenue. He did nothing, and Mr. Cline, on whom he relied, did nothing. And what you are seeing in their brief is nothing short of remarkable on this point. They are now saying, well, they concede that, but you know what? We will introduce supplemental declarations from Mayor Duggan or Kevyn Orr that in their opinion raising taxes would erode revenue and have the four or five different impacts on the

city that they articulate in their brief. Now, think about that for a second. Think about where the city has come to on this point. They have Mr. Buckfire, who's an expert. They have Mr. Cline, who's an expert. Neither of them evaluate this question, and the city, in order to support Mr. Buckfire, purports to rely on lay opinion testimony under Rule 701. They have two fundamental problems with that, your Honor. Point one, Mr. Buckfire himself didn't rely on it. If you look at his reliance materials, he doesn't say he's relying on Mayor Duggan's opinion that raising taxes is a bad idea.

Point number two is this is not something that's capable of lay opinion testimony, and what's interesting about this is that you actually had a significant engagement on the very subject of lay opinion testimony in the eligibility trial, and it is critical to understand that hypothetical questions are the classic hallmark of expert opinion testimony under Rule 702, not lay opinion testimony under 701, because 701 is typically reserved for the personal experience of a lay witness that does not require the application of specialized knowledge. Those are two of the hallmarks, in fact, the literal test under 701. The hypothetical question of what would happen in a dismissal scenario if taxes were increased pursuant to a judgment to city revenues is the quintessential Rule 702 testimony. You

cannot have a witness come in as a layperson and say this is what I think about that both because it's opinion testimony that's not appropriate and because that person does not have the specialized training to say that, and this is entirely consistent with JGR, which is the Sixth Circuit case that was at the crux of your analysis in eligibility. Think about what happened in JGR. You had an attempt to use a lay witness who was an accountant and an attorney to testify on the subject of lost profits and business interruption. And what the Court said was that person ought not to have been allowed to testify both because they relied on hearsay -- and you can see from the proffered grounds of why Mayor Duggan or Mr. Orr or whomever these people with the supplemental declarations would be, that they would be relying on things that they were told by others and also that the information is of the quintessential sort that's specialized in nature. So this is a situation where we disagree that they can attempt to prop Mr. Buckfire up with a lay witness testimony.

In addition, your Honor, there are additional assumptions where Mr. Buckfire simply has not done the work to support the assumption. He testifies that the city is service delivery insolvent but admitted that he hasn't really evaluated the extent of the service delivery insolvency, and that's a flawed methodology when there have been, by the admission of the city's own witnesses, changes in the level

of city services as a result of the bankruptcy.

In addition, he assumed that the city would not be able to implement the reinvestment initiatives in a dismissal scenario and that that would lead to eroding revenues of the city, and, again, he did not adequately perform a methodology that would involve testing that assumption to determine whether or not it's correct or not because, of course, he doesn't have a dismissal forecast that would allow him to see what funds above operating expenditures the city might have to invest, so you don't only have the problem of no discernible methodology in Mr. Buckfire's three -- I'm sorry -- three-paragraph, two-page opinion. You also have a number of assumptions that are just offered in the same sort of ipse dixit way where the expert has not taken the time to assess the underlying assumption, test its reasonableness. And that's the argument in sum and substance.

THE COURT: Thank you. Anyone else on this one?

MR. SOTO: Ed Soto, your Honor, on behalf of FGIC. Our brief tried to address more issues of methodology and not simply repeat the same ones. I don't think there is any doubt Mr. Buckfire has proffered four short paragraphs in support of his opinion on the city's creditor -- that the city's creditors will fare better under the city's plan than if the bankruptcy were dismissed, and his opinion fails, we believe, every one of the three requirements of Daubert, and

those are the requirement of reliability, the requirement of his qualifications, and the requirement that it ultimately would be helpful to this Court. And I'm going to try to touch on some issues that address those three requirements. I agree with Mr. Hackney that there is no doubt that certainly a trier of fact when the trier of fact is the Court, it certainly means that the Court might have more leeway in the timing of when something should or shouldn't come in, but Dauberts are different than motions in limine, and the key difference is that the Supreme Court has said that the Court has a gatekeeping function to assure that expert testimony that's inadmissible is simply inadmissible, and it shouldn't come in, and that's why the Dauberts are treated a bit differently and the gatekeeping function is highlighted a little more. And, again, Daubert's general principles apply to expert matters described in 702, and that includes the kinds of expert opinions that Mr. Buckfire is trying to give on best interest.

So turning now to the reliability prong of Daubert, which, again, this Court is required to assess, the Sixth Circuit has held that this prong requires District Courts to determine whether the principles and methodologies underlying the testimony itself are valid. The Sixth Circuit has explained that in order to meet this requirement, the expert's opinion must rest on some form of reliable

foundation, and I'm quoting from In re. Scrap Metal, which was an antitrust case here in the Sixth Circuit a couple years ago, and it's in our briefs. Otherwise the expert's opinion will constitute nothing more than his or her own -- and, again, they use that word ipse dixit. And I -- you know, it's not just -- not a word that I was familiar with, so, again, I looked it up. And in this one, ipse dixit is sort of like when someone looks at you and says it's so because I say it's so. And there are a number of different examples that they give, but that's the general one. The requirement that an expert be doing something more than that absolutely applies in the context of Mr. Buckfire's expert testimony, and, again, there's a distinction between Mr. Buckfire's factual testimony because he is proffered as both a factual witness and an expert witness, and we're only addressing the expert testimony as it goes to best interests.

So what it requires is a necessary -- Mr. Buckfire's best interest opinion precisely addresses this issue of ipse dixit. As you're probably aware, to satisfy best interests, the creditors in the context of this Chapter 9 case has to show that the creditors would fare better under the plan than if the case were dismissed, and, again, that requires a comparison of the creditors' recoveries under the plan with, you know, estimated creditor recoveries outside of the plan. And that comparison by its very nature requires an expert to

actually have evaluated and estimated what creditor recoveries would be outside of the plan possibly in a dismissal scenario. And the only way to do that is to actually consider all of the various complex issues that ultimately determine what creditor recoveries would be within the plan and in a dismissal scenario. Now, for instance, the debtors, what are their forecasted revenues, the value of the debtor's assets, the possible monetization of any assets, remedies that might be available outside of the context. There are any number of things that were very clearly obvious to be considered in connection with this best interest analysis, how the debtor would use revenues. This is not made up analysis as the city argued in their brief. It simply is the way that -- you know, to lead to a reliable conclusion on best interest. In fact, the Court in In re. Barnwell considered these exact factors in evaluating the best interest test under a 943 scenario, and that's cited in our briefs as well, your Honor. There the Court considered, one, the debtor's revenues in the absence of the proposed plan; two, the value of the debtor's assets in the absence of the proposed plan; three, the likely distribution of assets to creditors in the absence of the proposed plan. These are the exact same factors that if you look at our brief we're saying Mr. Buckfire specifically didn't consider. It's not arbitrary that we come up with these factors or unsupported.

They come from the case law. The fact that the In re. Barnwell County Hospital case ultimately turned on different facts has absolutely no bearing on the types of general overarching factors that courts should consider when they're assessing the best interest analysis. But Mr. Buckfire failed to appropriately consider any of these factors. In fact, he made no effort whatsoever to systematically estimate creditor recoveries in a dismissal scenario whether through an estimated dollar or percentage amount or any other formula. Here are the clips of Mr. Buckfire's deposition that I think are most relevant for the Court to hear. I'm hoping it's Mr. Buckfire.

(Deposition clips played at 2:38 p.m. as follows:)

"Question: Isn't it true that in coming to your opinion that creditors do better under the plan than they would do in a dismissal scenario, you did not construct a forecast of the city's revenues and costs in a dismissal scenario; correct?

Correct.

And I take it you've never sat down with a piece of paper and tried to work this out, right, in terms of what the total claim size would be; correct?

Correct. We have not done a dismissal analysis."

(Deposition clips concluded at 2:38 p.m.)

Mr. Buckfire also admitted that he didn't do any analysis as to how the city would use any surplus revenue to satisfy creditor claims, and he admitted that he didn't do any analysis as to whether the city could or would monetize its assets in a dismissal scenario, including the DIA assets, and how the monetization would impact any creditor recoveries. That's a really important issue in this case, your Honor. These are only a few of the relevant factors that Mr. Buckfire readily admitted he didn't analyze in coming up with his opinion, and it's not just Mr. Buckfire who failed to conduct this analysis. None of the city's witnesses or representatives have filed, produced, or otherwise provided any systematic or thorough dismissal analysis that evaluates these factors that Mr. Buckfire could rely on, and without that kind of analysis, an expert simply cannot reliably estimate creditor recoveries in a dismissal scenario or opine how creditors' recoveries in a dismissal compare with the creditors' recoveries under the plan.

Your Honor, it's instructive to consider how Bankruptcy Courts have approached the best interest analysis in the context of Chapter 11 cases, although we're not in one, but, again, they also reviewed those same factors, and this was known to everyone when Mr. Buckfire was selected as an expert to address that issue.

In this regard, I would point your Honor to the

report of FGIC's expert, Steve Spencer, who we've discussed a little bit this morning, which was attached to our Daubert motion, and that report stands in stark contrast to Mr. Buckfire's report. Mr. Spencer --

THE COURT: Okay. But what he said or did isn't relevant to whether Mr. Buckfire's testimony is admissible.

MR. SOTO: Well, what it's relevant to is to determine what would you look at if you were trying to do a dismissal scenario. That's all. And if the Court is happy with that issue, we'll move on.

THE COURT: Well, but, again, what he did or didn't do doesn't tell me anything about what the law requires.

MR. SOTO: No.

THE COURT: It only tells me what he did.

MR. SOTO: No. I was using it --

THE COURT: All right.

MR. SOTO: -- as an example of what the law was. We just went through what the law requires by going through the --

THE COURT: All right. All right. Let's just let that rest there then.

MR. SOTO: And, your Honor, we're not talking about whether Mr. Buckfire's opinion -- this is the other thing that came up in the briefs. I'm trying to respond to the arguments in the briefs. One of them was that, well, Mr.

Soto, really all you're saying is his opinion is weak, so show it. Show it. Put him on the stand and show it. But that's not what we're talking about here. We're talking about a witness who did not do any of the analysis that's required in order to give his interest opinion -- his best interest opinion in the first place. That's a little different than the motions in limine that we just argued. This is that gatekeeping function. Instead of using a reliable methodology, Mr. Buckfire assumes that the creditors' recoveries in a dismissal would be de minimis. It's literally a three-page order, and I won't repeat what Mr. Hackney said about that, but that's what he does.

One of the assumptions that Mr. Buckfire addressed was, for example, whether or not a city like Detroit could choose like any other municipality could choose to monetize an asset, sell it if it wanted to to address issues, because the critical assumption is that somehow creditors -- and, of course, he's right -- creditors couldn't force the City of Detroit to sell these assets. That has nothing to do with whether or not the city -- whether in analyzing best interest the city might elect to do that and might elect to do it for any number of reasons, including its desire to continue to do business with third parties that are owed money or any other reasons. So beyond that, your Honor, and, again, to get around the issues that Mr. Hackney has already addressed,

there are other assumptions that Mr. Buckfire makes that are unsupported. For instance, he makes the unsupported assumption regarding, as you heard before, the race to the courthouse. Again, he assumes that creditors' recoveries in a dismissal will be de minimis. Mr. Buckfire engaged no analysis whatsoever regarding the claims or sources of the claims that would result in this so-called race to the courthouse. Here again, Mr. Buckfire's response as to why no such analysis was performed was that, look, we thought it was pretty obvious people would run to the courthouse. His assumptions regarding the courthouse are, therefore, again, totally unmoored in any analysis, in any methodology, or in any facts that anybody could address. While the city's opposition focuses on the fact that a race to the courthouse would, in fact, occur, that argument misses the point that the Daubert law makes. The more salient point for purposes of Daubert is that Mr. Buckfire simply assumed it. He did nothing to substantiate it. That's the distinction here on Daubert from the other arguments we were making this morning. Mr. Buckfire also made unsupported assumptions regarding the availability of benefits of the grand bargain funds. According to Mr. Buckfire, creditors would have -- would not have the benefit of hundreds of millions of dollars stemming from the grand bargain in a dismissal scenario, but Mr. Buckfire testified that he never evaluated whether the

city would be able to solicit funding from the grand bargain participants in the dismissal scenario, again, another issue that we only tangentially touched this morning.

What's more, Mr. Buckfire's best interest opinion extends to all the city's creditors, yet, as Mr. Buckfire acknowledged at his deposition, only the retirees benefit from the proceeds of the grand bargain. He understood that. That means that even if the proceeds of the grand bargain were unavailable in a dismissal scenario, that certainly wouldn't change anything for the COPs claims recoveries, and yet Mr. Buckfire made no attempt to address that issue or to support those assumptions.

THE COURT: Let me ask you to wrap up, please.

MR. SOTO: I will. So beyond the unreliability and beyond the unsupported assumptions is the issue of would it be helpful. And, again, I think this Court is certainly able to address the issues that Mr. Buckfire addressed without any assumptions. Your Honor, you don't need Mr. Buckfire to make the same unsupported assumptions. If you want to make them, you could make them. The difference is you're the Court, so his testimony won't assist the trier of fact in any way, and we think it should be excluded under Daubert.

MR. CULLEN: May it please the Court, Thomas Cullen of Jones Day representing the city and opposing the motion. I think what --

THE COURT: Well, here's my question for you.

MR. CULLEN: Yes.

THE COURT: Is there anything more to Mr. Buckfire's opinion than this? He assumes the city cannot be compelled to sell assets. He assumes that creditors cannot lien assets. He assumes the city cannot raise taxes, and he assumes that none of the grand bargain benefits would flow to creditors in the case of a dismissal and that as a result of all of those assumptions, creditors would get little or nothing in the event of dismissal. Is there anything more to what he says than all of that?

MR. CULLEN: Yes, there is, your Honor. First --

THE COURT: Well, I want to hear what that is because if that's all there is to it, then I have to agree with Mr. Soto that that's not helpful.

MR. CULLEN: First, your Honor, note the nature of Mr. Buckfire's expertise and his role in this case. He is the one who constructed and went to the market with -- and went to the creditors with all of the financial instruments that are at issue in this case. He had to construct those financial instruments so that they would be saleable to the creditors and saleable to the market. He had to construct them on a basis of the plan itself and take the money for those instruments and the expectations embodied in those instruments out of the plan. Very early on, as he testified

on deposition, he did a priority analysis with respect to the creditors in the absence of a bankruptcy proceeding, and he testified on deposition that the COPs claims in that priority analysis, for instance, are swamped because of the size of the other claims and the nature of their priorities in any waterfall setting. His specific expertise, which is the financial plumbing, if you will, of something like this, is precisely saying what is and what is not a saleable credit. In the context of the bankruptcy, he is saying on the basis of all of this that Detroit is not a bankable credit without this plan. It cannot access markets. That's one of the punch lines.

THE COURT: Okay. But that conclusion isn't being challenged here.

MR. CULLEN: But that's part of the best interest conclusion. In this case, as your Honor knows better than I, that so many of the standards overlap because the elements overlap, and part of the issue is here that they are criticizing Mr. Buckfire merely for using his judgment based on all of these things that if he were advising a client this is in your better interest, that's his judgment. He is qualified to make that judgment.

THE COURT: Right, but how is that judgment helpful to the Court? It has to -- it has to be helpful.

MR. CULLEN: Well, I believe it is --

THE COURT: If all it is is if the case is dismissed, the creditors can't access the markets, access assets or access taxes, therefore, they're better off through the plan than they would be in a dismissal scenario, how is that helpful to me?

MR. CULLEN: It is --

THE COURT: That's like duh.

MR. CULLEN: It's a judgment, your Honor, and it's a judgment by a man qualified to make these judgments. I can make this argument based upon the papers. I can make the -- I could make all of those arguments based upon the eligibility record and the eligibility findings of the Court, but in terms of making a judgment that this financial structure is better than that financial structure for the creditors and using the stand-alone projections, the projections without the plan, Exhibit J to the plan, as a proxy for the analysis, that's -- that is helpful to the Court. I would also submit that helpful to the Court is the idea of why, if this other analysis from Mr. Spencer is to be offered, other kinds of dismissal analyses are going to be offered, that he can testify in his expert opinion that that's the inappropriate analysis to do in this case as to why he didn't do it, why he made the judgment that that was an inappropriate analysis. And it's not just assuming with respect to these things. It is based upon the record in this

case that these things are established and if they're established, what consequences --

THE COURT: What is it you assert that is established that he relied on?

MR. CULLEN: Well, that there's a reasonable basis for the assumption that the city can't raise taxes. There's a reasonable basis for the assumption that the city cannot be compelled to sell assets, things which Mr. Hackney says he agrees on now, so what does that mean to -- what do all of those things mean to a financial creditor in the absence of the plan? And he's a man who makes his living devising these instruments and notes and advising financial creditors on whether this is a good one or whether that's a bad one, and that is to some degree cumulative evidence but evidence of this. Part of what is the premise -- the premise of the argument here and the premise of the attack on Mr. Buckfire is that on the one hand I agree with the Court, and I agree with some of the cases that in this kind of a setting, the feasibility -- the best interest test should not be one of the hardest things in this case. There are other tougher issues than this because of these self-evident propositions that underlie the analysis, but those self-evident propositions, some of them self-evident, some of them established in eligibility or elsewhere, some of them established by the testimony of other witnesses, all of those

things have to be subjected to a level of judgment, and it isn't ipse dixit to supply judgment to a set of facts. Daubert doesn't say that. No one says you have to have a model or you have to have a qualitative answer in order to submit an expert opinion. And I think underlying here, stepping back again, your Honor, on this is that -- and this is to some degree, I think, responsive to your nomenclature question of earlier. I think what is absent from this objection and from the scenarios they spin out for the city, one, is any sense of reality. Number two is any concept that the city has a civic responsibility that it can have a justification for its actions based in its civic responsibility. The dismissal scenario they want to play out, the liquidation scenario, is specifically outside the realm of -- outside the realm of Title 9, so what we're --

THE COURT: Well, but, see, now you're arguing the weight to be given to this witness' testimony compared to others, not its admissibility.

MR. CULLEN: Well, and that's what I was going to start out with, your Honor, the two cases they cite. Let's look at those cases. In one, the Dura case, where they cite for the mouthpiece point, that was actually -- it's interesting to look at the procedural posture. What had happened is that a hydrogeologist had testified on the basis of a flow model about participation and pollution. It turned

out he hadn't conducted that analysis or he hadn't even -- and that analysis hadn't been subject to discovery, so how it came up was to fix that problem they put in two affidavits of the people who had conducted the study and who were expert in that kind of mathematical model. The District Court said these are expert reports, these declarations, and they are late, and, therefore -- and, therefore, they're out, and there is nothing in the record that can arguably support this. But if there is something, if there is something in the record to arguably support an expert's opinion, if there is some basis for the assumptions -- and here we have assumptions that have a strong basis to which he applied seasoned judgment -- then they're let in. And that is the Scrap Metal case, so if you look at the language there, the Court is pretty strong where it says, "Even if I don't agree with the assumptions, that's for the trial. We can litigate out these different assumptions."

THE COURT: Let's pause there.

MR. CULLEN: Okay.

THE COURT: It seems to me the strongest argument that the movants here make in challenging Mr. Buckfire's several premises relates to the RJA tax. Buckfire says that won't result in any significant revenue for the creditors --

MR. CULLEN: Yes, your Honor.

THE COURT: -- right?

MR. CULLEN: Yes.

THE COURT: Where's his analysis on that? Where does that come from? What's the basis for that?

MR. CULLEN: Well, if I may, your Honor, that there has been no political figure associated with the city from -- let's cast our minds back to the eligibility trial and the Court's review of all of the public reviews of what the city could and could not do there and the fact that the city was in a desperate situation and could not, consistent with maintaining its population and its economics, raise its taxes. That was the consistent message of every study the Court looked at.

THE COURT: But this is a different question. This is not the city voluntarily raising its taxes. This is the city being mandated by a court to raise its taxes to pay a judgment.

MR. CULLEN: With all due respect, your Honor, that requires -- and we've submitted a supplemental report on that -- the fact that the city's assets, as Mr. Buckfire had analyzed them over the course of this case, including the analysis he went through at the very first hearing on eligibility where we went through, if the Court will recall, in detail all of those assets and the availability of the tax base of the city as a source of revenue, we have made the judgment all along and the responsible parties have made that

judgment that this is disastrous for the city. And based upon the uniform course of disaster for the city and raise taxes, that is a reasonable assumption for him to make. It is reasonable for him to say that there's not --

THE COURT: Well, but pause there because unless I am missing something, his testimony as to what the basis of that assumption was wasn't any of that; right? It was Mr. Cline who he, I think, testified did an analysis that he relied on, but Mr. Cline did no such analysis.

MR. CULLEN: This gets back a little bit to the Dura case; right? Mr. Cline is in Ernst & -- is in a group within Ernst & Young. Working with Mr. Cline is a Ms. Sallee, who analyzed the property tax rates and the property tax basis. It was Mr. -- Ms. Sallee reported to Mr. Cline. All of that work was part of what was going on here at the same time, and if Mr. Buckfire referred to Mr. Cline, I think he was referring to Mr. Cline's operation, which includes Ms. Sallee, who did do the analysis. So in this connection, what we're really saying -- what we're really hearing here is Mr. Buckfire didn't assume things that he knew not to be true or felt -- had concluded were not true. He didn't do an analysis that he thought was not useful in this connection, and now they say that he should have -- he needed to -- in addition to exercising his professional judgment, he needed to have a piece of paper that had numbers on it, whether he

thought those numbers were speculative or not, and he needed to assume things about the city that the grand bargain survives, that there's money for reinvestment, that there's money in this already over-taxed tax base.

THE COURT: No. The argument is not that he should have assumed that. The argument is that he should have investigated that.

MR. CULLEN: Well, I submit, your Honor, that some of the things they asked him to investigate are -- they say assume that pigs fly, and then they ask him to say, well, has he studied the aerodynamic qualities of pigs. He didn't do it because he concluded in his expert judgment that some of it was just dumb, and he'll testify to that. And the reason that the lay testimony is useful on this is that I don't think that it is really possible for anybody acquainted with this city to get up there and testify as a fact witness that any of these things could possibly happen; that there's any factual basis for the idea that, oh, the grand bargain gets reconstituted, oh, we impose a confiscatory tax rate and people flock to this overtaxed city. Oh, we sell everything in the place, and that's all better for creditors. No one has -- no real person thinks those are real ideas. No real person will testify to that. You can get a lawyer, you can get an economist, you can run a model, but no real person believes any of that, and so Mr. Buckfire did not test those

assumptions.

THE COURT: All right. So that circles back to my original question. If all he's testifying to is in the case of a dismissal, there's no money for creditors, therefore, the plan is better for creditors, why do I need him?

MR. CULLEN: It helps, with all due respect, your Honor, that there is a record here about how this entity will be viewed by financial markets and by investors and by creditors inside and outside of bankruptcy. We all have our opinions on that, some at the top of our lungs. Mr. Buckfire has the opinion of someone that the objectors identify as an expert in these instruments and in these markets, and he can testify --

THE COURT: Okay, but let's pause there. Does he link --

MR. CULLEN: -- one is better than the other.

THE COURT: Does he link the city's access to capital markets, a judgment which is not contested here, to his conclusion that the plan is in the better interest of the creditors compared to dismissal?

MR. CULLEN: Yes, your Honor. I believe he did on the depositions.

THE COURT: What's the link? That doesn't jump off the page at me. What's the link there?

MR. CULLEN: Well, the creditors -- nearly all of

the creditors are going to get paid with city paper of some sort. If the city is giving them paper, which is paper like any other in financial markets, the city's creditworthiness, the fact that the city has a bankable credit, is linked to that. That's the currency we're paying.

THE COURT: Right, but that's a different question. The question -- the best interest question is if the case is dismissed, how is the city's lack of access to the credit markets going to impact creditor recoveries?

MR. CULLEN: We have no -- we have no currency in which to pay them. The currency which is available in notes against a solvent city that doesn't need new access to the capital markets is not there, so we have no currency with which to pay them. The only currency, the only currency is a confiscatory property tax rate. So without any currency or access to currency, it would have --

THE COURT: So the judgment -- so the judgment, just, you know --

MR. CULLEN: Okay.

THE COURT: -- in kindergarten terms, the judgment is the city wouldn't be able to borrow money to pay its past debts.

MR. CULLEN: That's part of it, your Honor, yes, sir.

THE COURT: Been there, done that, don't want to do

it again anyway.

MR. CULLEN: Precisely, your Honor, precisely.

THE COURT: Well, again, why do I need him to tell me that?

MR. CULLEN: We thought it would aid the Court.

THE COURT: You can call me as a witness. I've already said the city is done making bad deals. Strike that. I didn't mean that. I didn't mean that.

MR. CULLEN: We meant it to aid the Court and the record --

THE COURT: I can see the headlines now, Judge says city should call him as a witness.

MR. CULLEN: We did it to aid the Court in coming to these conclusions with a person who has the credibility to come to these conclusions based upon his career and based upon his talents. This record is going to travel outside of this courtroom. It will be in front of -- with all due respect to the Sixth Circuit, it will be in front of judges who haven't worked this case as hard as you. It will be in front of other people who'll want to find different ways into this complex set of events and into the --

THE COURT: Well, but Rule 702 doesn't allow me to admit otherwise inadmissible expert testimony because the Court of Appeals might need it.

MR. CULLEN: No, your Honor, but we all have a

responsibility to the record, number one, and what is required -- and I think a close reading of both Scrap Metal and Dura says that what we need is an expert with qualifications. What we need is a reliable method, the method he uses to value securities and to look at financial markets, and then he can make a judgment.

THE COURT: If it's helpful.

MR. CULLEN: Pardon?

THE COURT: If it's helpful. The rule says helpful; right?

MR. CULLEN: I understand, your Honor, and our job of work here is to try to be helpful to the Court and helpful to the record. That's all I have, your Honor.

THE COURT: All right. I'm going to take this under advisement for a mere five minutes, and we'll reconvene at three -- you want to say something?

MR. HACKNEY: One brief point.

THE COURT: One brief point.

MR. HACKNEY: I'm sorry. I know that --

THE COURT: No. Don't apologize.

MR. HACKNEY: Okay. There was a statement made that Mr. Buckfire may have been confused when he referred to Mr. Cline instead of Ms. Sallee. That is not correct. Ms. Sallee also testified in her deposition that she had not done any analysis either, so this is not a situation where someone

at Ernst & Young did the analysis; it was just Ms. Sallee, not Mr. Cline. No one had done the analysis.

MR. CULLEN: If I -- if you took me to imply that someone had done a dismissal analysis --

MR. HACKNEY: No.

MR. CULLEN: -- of the sort that you said, I didn't mean to --

MR. HACKNEY: No.

THE COURT: No, no.

MR. HACKNEY: A tax increase analysis.

THE COURT: Yeah. The question was --

MR. HACKNEY: Increase analysis.

THE COURT: Right.

MR. HACKNEY: That was not done.

THE COURT: What would happen to the city's economy or finances in the event of a mandated tax increase?

MR. HACKNEY: Ms. Sallee had never heard of the RJA, had not evaluated increased taxes pursuant to an RJA judgment at the time of her deposition.

THE COURT: All right. Thank you. All right. 3:15, please.

THE CLERK: All rise. Court is in recess.

(Recess at 3:07 p.m., until 3:15 p.m.)

THE CLERK: Court is in session. Please be seated. Recalling Case Number 13-53846, City of Detroit, Michigan.

MR. CULLEN: Your Honor, I'd like to note, for the record, if I might, the addition at our table of Mr. Orr.

THE COURT: Welcome, sir.

MR. ORR: Thank you, sir.

THE COURT: The matter is before the Court on the motions of Syncora and FGIC to exclude the testimony of Mr. Buckfire regarding creditor recoveries upon dismissal of the bankruptcy case. The Court concludes that the motion should be granted. The motions spend a lot of time challenging the lack of analysis by Mr. Buckfire relating to his various assumptions that led him to conclude that the plan is in the best interest of creditors because they would receive either nothing or a de minimis recovery outside of bankruptcy in the event of a dismissal.

On this point, with the exception of the assumption relating to taxes, the Court agrees with the city that most of those assumptions are relatively self-evident. It is true, on the other hand, as is argued here, that Mr. Buckfire should have done an analysis on a more careful basis regarding the consequences to the city and to the city's tax collections of RJA proceedings, but the real basis for the Court's granting this motion is that it must conclude that Mr. Buckfire's judgment about best interest is not particularly helpful to the Court. Ultimately, his judgment is that if the sort -- if the city has no assets available to

pay creditors outside of bankruptcy and no ability to collect additional taxes to pay creditors outside of bankruptcy and no other sources of income such as perhaps from the grand bargain with which to pay creditors outside of bankruptcy, then creditors will get nothing outside of bankruptcy. The trouble with that conclusion is that there's really no judgment involved there. It inevitably flows, and it's not -- it's, therefore, not helpful to the Court, so on that grounds, the motion is granted.

Let's begin our trial now with the opening statements from the city, please.

MR. BENNETT: Your Honor, I have one question before we begin. What is your plans for wrapping up tonight?

THE COURT: Our schedule calls for us to run until five, so if there is a natural break in your opening statement that occurs a few minutes before or a few minutes after that, please let me know.

MR. BENNETT: Okay. I will aim for one. And also so that we don't have to break up during the discussion, there will be five handouts that I will get to at some point during the discussion. They've all been supplied to the objectors. I've made a whole bunch of sets of --

THE COURT: Thank you.

MR. BENNETT: -- each one of the set of five for you and your staff, so may I approach?

THE COURT: Yes. You may hand them up, please.

OPENING STATEMENT

MR. BENNETT: Your Honor, I'm going to begin with your eligibility opinion, and right at the front you wrote, "The evidence before the Court establishes" -- I'm sorry. Bruce Bennett of Jones Day for the city. Forgot.

THE COURT: I think we got that.

MR. BENNETT: "The evidence before the Court establishes that for decades, however, the City of Detroit has experienced dwindling population, employment, and revenues. This has led to decaying infrastructure, excessive borrowing, mounting crime rates, spreading blight, and a deteriorating quality of life. The city no longer has the resources to provide its residents with the basic police, fire, and emergency medical services that its residents need for their basic health and safety. Moreover, the city's governmental operations are wasteful and inefficient. Its equipment, especially its streetlights and its technology and much of its fire and police equipment, is obsolete. To reverse this decline in basic services, to attract new residents and businesses, and to revitalize and reinvigorate itself, the city needs help."

There is no doubt, your Honor, that during the past roughly year progress has been made, but Detroit is still a city in distress, and the four paragraphs of your eligibility

opinion that I read hold as true today as they did then.

We are here today finally to obtain that help, and the purpose is no less than to save the City of Detroit. The city needs more net revenue than it has to provide adequate services and service legacy debts. It's operated in a distressed condition for so long that expenditures needed include vast amounts of investment. Sometimes we call it reinvestment. It's the same thing. Detroit won't recover or survive if this isn't done. Because the city can't raise any more revenue -- and we're going to talk a lot about that -- it was obviously a subject covered a few minutes ago -- its taxes are already at statutory limits, and its tax rates are the highest charged by the cities in Michigan, Detroit's debts must be adjusted and be adjusted significantly. The plan is the vehicle that frees up necessary funds so the city can, once again, provide adequate services for its residents. The plan is immensely detailed and somewhat complex, but I think just for a second I want to go over a half dozen highlights.

Debts are reduced by roughly $7 billion. Other post-employment benefits represent the largest component of debts eliminated in the plan, so this is not by any means a plan that is made possible on the backs of financial creditors. Principal payments on the vast majority of the remaining debt is deferred until the tenth year following

confirmation and runs out thereafter, and these things make room for a massive investment program targeting the problems found to exist in your eligibility decision. The gross amount of those investments are a little more than 1.7 billion, but some of those investments generate revenue themselves. Others have the effect of reducing expenses, so we calculate a net investment of roughly 877 million.

I will get to feasibility later and in more detail I think probably tomorrow, but for now I will say that the city believes that the investment will be sufficient to address the city's most pressing needs. And while there are undoubtedly additional expenditures on the lists of many who have evaluated the city's condition, the city believes that the planned investments will be sufficient to rehabilitate the city. Thus, the plan serves the overriding goal of Chapter 9. It will rehabilitate a city in distress.

At the same time -- and we mean this just as firmly -- the plan provides creditors with all the city can provide them from sources of value creditors are entitled to reach. That will be our first topic for today. This is demonstrated by the analysis of the Court's own expert and the forecasts and projections produced by the city that show that all or substantially all of the revenue sources that creditors may reach and are permitted to reach are exhausted.

In light of the objections that have been filed and

the time we have to spend on dealing with them today and through the confirmation trial, it's really easy to lose sight of how broadly consensual the plan really is. The largest classes in this case are the retiree classes, the GRS pension class, the PFRS pension class, and OPEB, and the plan has been accepted by all of them. Those are the largest in terms of number of members. They're also the largest in amount. And the OPEB distribution or the distribution on account of the OPEB claims is the same as the COPs distribution.

Further demonstrating that the plan is not a product of hostility to financial market creditors, we note the plan has been approved by the UTGO bond classes or class -- sorry -- the LTG bondholder class, and, of course, there was a settlement reached with the DWSD bond insurers that resulted in a refinancing and significant savings, so the remaining debt is unimpaired here.

It would have pleased us enormously to have brought to the Court a fully consensual plan, but given the number of affected creditor constituencies and all of the different positions they took at the outset of the case, that might have been much too much to hope for.

We could be here all day and all day tomorrow if I used this opportunity to do what is sometimes done in Chapter 11 confirmation hearings and review all of the confirmation

standards one by one and demonstrate how they are met. We just don't have the time for it. That has been done comprehensively in our papers, in particular in a chart I hope the Court found helpful attached to our pretrial brief. I am going to confine myself, first of all, to issues that have been actively controverted and even there at some of the more central and more important issues that are before the Court. That I leave something out in the oral presentation does not mean a relevance standard hasn't been met. It means we've covered it in our papers, and it didn't rise to the level of something to reserve time for today. If there is anything that I miss, we'll get to it on closing, but I've tried to focus on the most important points in the controversy, and I'm also going to use an organization that's a little different from the organization that we used in the papers. And really my purpose is this. I'm going to explain why we meet the confirmation requirements that are most actively controverted and how it is that we will overcome the objections both as a matter of law and as a matter of the facts that we will show. One of the reasons for organizing it as I have is that one of my contentions throughout will be that the Court is actually confronted with many fewer material disputed issues of fact than some of the objectors would have the Court believe. I think that we will be able to demonstrate -- and it is one of my points here -- that the

city is much further along in having already established many of the needs -- many of the things it needs to establish to earn confirmation of its plan than our opponents are willing to concede.

So here's the proposed organization. You can't help but notice that running through arguments on best interest, whether settlements are approved and discrimination a central topic is whether or not assets of the city and, in particular, what I will call the DIA assets can be reached by creditors in order to satisfy claims. We will confront that issue first. And the resolution of that issue is going to contribute to the argument and to the resolution of objections to the approval of settlements and, in particular, the DIA settlement, objections that the plan doesn't meet the best interest of creditors, and about whether or not the plan has any unfair discrimination in it. As I said before, it turns out that the status of assets in a Michigan Chapter 9 case is going to be an important building block to resolve all of those issues, and at that point we will be in a position to very briefly demonstrate that the plan was filed in good faith. There are a handful of relatively smaller issues that if we have time I will digress to cover, and then last but certainly not least -- we know it's very high on the Court's agenda -- we will address the issue of feasibility.

Okay. First big question. What are an unsecured

creditor's rights to recover from assets owned by a Michigan city, and what, therefore, are such creditor's reasonable expectation about any such recovery? Let's start outside of Chapter 9 because outside of Chapter 9 are where creditor rights are fundamentally established. I think there is no disagreement left, I think, that outside of Chapter 9 the answer is absolutely no access to assets and, therefore, no expectations about a recovery from them. You don't have to take my word for it. One place you can look for it is in FGIC's pretrial brief at page 92 where, as part of their discussion of best interest, they say, "Pursuant to the RJA, which is the Revised Judicature Act, unsecured creditors' and the Retirement Systems' only remedy against the city would be to get a court to order the city to levy taxes in an amount sufficient to pay the judgments." I want to make two short observations of that before moving on, and this is an aside we'll come back to later. Outside of bankruptcy they may not be right actually about the retirees because there are two provisions in the Michigan Constitution dealing with retirees, the nonimpairment clause and the funding clause, but we'll get to that later. And the second point I want to just remind us about -- we'll come back to it -- is that the sentence I read is kind of a launching point for discussion in the FGIC brief about the idea that it would be a good idea to subject the city to increases of taxes under the RJA. It

would find -- the city would find that enormously distressing, and, therefore, it would be convinced to sell the DIA assets after all. That is the route to assets that was proposed in the FGIC brief. But we don't have to take the FGIC brief as the only basis for this. As we point out in our papers -- and I'm not going to repeat all the argument about this -- most centrally Michigan law prohibits creditors -- unsecured creditors from levying or executing -- the statute I think uses the word "executing" -- on any asset of a municipality. That's MCL 600.6021(I). It's cited at page 68 of our pretrial brief. So just again pausing in the out-of-court environment, the fact that no city assets can be levied on or sold outside of Chapter 9 and that the exclusive remedy is an increase in property taxes under the Judicature Act is or ought to be a powerful warning to every potential lender and insurer not to lend any money to a municipality based on an expectation that a creditor can compel the sale of an asset, core or noncore, to borrow terms others have used but the Bankruptcy Code does not, to pay a debt.

Now, I want to pause a second. It is certainly true that for many purposes we bring to this Court models and ideas about Chapter 11 cases and start applying them in Chapter 9, and here's one place where it would be a big mistake. In Chapter 11 when we have a corporation, a corporation has creditors. Creditors can levy on almost

everything. There are very few exceptions in an individual debtor case. There are some exemptions, state-level exemptions. In the case of the corporate world, the one people find themselves confronting most often is a relatively odd rule in Delaware prohibiting the ability to execute on LLC interests, but in -- the general rule with respect to creditors are -- unsecured creditors, if they're not paid, they go to court. They get judgments. They sometimes can get attachments. It depends on the state. If they get a judgment, it's not paid, they can execute. They get help from a sheriff.

As we've just seen, at least as to Michigan municipalities, a similar concept doesn't apply. An unsecured creditor doesn't have a general claim against a general estate or against all property of a Michigan municipality. In fact, to the contrary. The statement is there is no claims against the assets of a municipality or of a city. There is only the ability to go to court to raise property taxes to get a levy for a creditor's benefit on the tax roll.

I don't know if FGIC, Syncora, or the initial purchasers or petition date holders of the COPs ever focused on the existence of the DIA assets when they made their loans, but I do know that if any of them are one-tenth as sophisticated as they say they are, the DIA assets weren't in

their credit analysis at all for these reasons.

Okay. The next question is if that's the reality -- and it is under Michigan law -- did the filing of the Chapter 9 case change anything? What the creditors have done or the objectors have done is cited basically five cases for the proposition that something about the best interest test requires the use of city-owned assets to provide recovery for creditors. We are going to spend some time -- well, we spent time with one already. I don't think we only have to spend time on the other four, and it's actually three because two of them are the same case, but we've just seen that there's nothing in Michigan law that supports that conclusion or supports that argument, so what is it about Chapter 9, if anything, that expands the rights of an unsecured creditor in bankruptcy from what that creditor's rights are under applicable nonbankruptcy law? The answer is nothing. There are, of course, provisions of Chapter 9 that reduce or limit creditors' rights. A few that come to mind in the Chapter 9 context, invalidation of rights to gross revenues as opposed to net revenues with respect to special revenue debt. It turns out that liens of distress for rent are not allowed in in Chapter 11, Chapter 7 cases. They're also not allowed in Chapter 9. Claims for unmatured interest are disallowed. There is the automatic stay. I can go on and on and on. All these are limitations of existing rights that exist under

state law. There is no provision of Chapter 9 that enhances the rights of an unsecured creditor in Chapter 9 at all.

In fact, if we were looking around, if we thought that we needed additional reasons to say the baseline Michigan law moves into Chapter 9 uninterrupted -- well, actually significantly interrupted but not augmented in any way, there's actually ample suggestions that the drafters of Chapter 9 may well have thought or understood that Michigan law and other states' law is not unique in this realm, and there are ample suggestions that Chapter 9 is not much concerned with property owned by a municipality at all, so the first place to start, of course, has to be 904, which says no court jurisdiction over municipal property, and then just so that we know they meant it, no court jurisdiction over or ability to interfere with -- ability to interfere with income-producing properties. They kind of got it both ways in the same statutory provision. It's been noted before, I think, in this Court that there's no property of the estate concept anywhere in Chapter 9. There's no turnover provision in terms of recovery of property of the estate anywhere in Chapter 9. There are no controls on the use of sale of assets not in the ordinary course of business, which, if you were concerned about assets in any way you might have put into Chapter 9.

And now I want to turn to the cases because,

frankly, the cases aren't to the contrary. Case number one, Fano. I don't think we have to talk about Fano anymore, but it's -- to remind before, it's an eligibility case. It nowhere states -- it says, of course, that debtor was not eligible for relief in light of the circumstances. Remember the circumstances, which is day one, debtor borrows money. After day one, debtors improve a whole bunch of facilities, create them, it seems from the opinion, to be a little bit better than they absolutely need it to be, and after that the debtor finds not having enough money. Of course, it is not the facts of this case. It's never been asserted to be the facts of this case that the city borrowed money, bought art, found it couldn't repay money. Not the facts of this case at all. But in any event, Fano is an eligibility case and never says that as a consequence of what happened, even in Fano, facts that aren't close to the facts here, that the result is creditors have a right to recover assets, to execute against assets, to compel their sale, to share in their value.

Pierce, second case that's appealed to for this purpose. Why is Pierce appealed to? Pierce is the case that involved the housing project that had all kinds of problems. I think it was mold. There was a potential claim against attorneys. The estate -- the plan says you can't pursue that claim unless a certain committee agrees that you can. Pierce is a case under Washington law, and, frankly, the most

important fact of the Pierce case -- it's right in the opinion. It says that the housing authority there involved had no taxing authority. Now, I don't know what Washington law was in front of the Pierce court, but I have a nagging suspicion that if it had no taxing authority, Washington law as to housing authorities did not preclude access of creditors to other assets. It didn't have taxing authority to be a major source.

Next are two hospital cases, Barnwell County Hospital -- Barnwell came up a little in the last argument -- and Bamberg County Memorial Hospital. It turns out those hospitals are located near each other. They were in two separate vehicles, it seems. That's actually not entirely clear. But the plan was for all -- for these two hospital entities and several others in the area to sell their assets. The case starts with an asset sale agreement, or I think it was called an asset purchase agreement, from the other guy's perspective, and the plan was to sell the hospitals and distribute the proceeds. You'll find that the form of the opinions in Barnwell and Bamberg are findings of fact and conclusions of law, and they kind of read like they started with a form that was provided by prevailing counsel because of just the words that are used and the way that the words are used that kind of shows. And along the way there is a boilerplate finding in both opinions in exactly the same

words saying that the price was fair under a plan that was to sell assets. This, your Honor, does not amount to a statement that somehow Chapter 9 changes background law, creates rights that creditors don't have under background law, and gives them the ability to reach assets they can't reach under background law, compel them to be sold and then to take the proceeds.

The last case, frankly, is going to be the most memorable, I hope, and it is Connector 2000 Association, Inc. Remember the Inc. It's going to turn out to be important. In Connector 2000 all impaired classes accepted, no trace of any objection to filing of a plan in good faith or objection on best interest grounds. In fact, if you read through, again, boilerplate-type findings of fact, conclusions of law with many provisions that debtor's counsel like to put in but judges don't often put in by themselves, it seems very clear very quickly that scope of releases was the only litigated issue in the case, but the boilerplate plan or findings of fact, conclusions of law I think in three places has the quote that has been brought to you in the Syncora brief, I'm certain, and I think also in the FGIC brief to the extent that they've maximized assets. Well, I said remember the Inc. in the caption. The reason is is that Connector 2000 Association, Inc. doesn't involve a political subdivision like a Michigan political subdivision whose assets are

protected by law. It's a nonprofit corporation that was only a municipality because its board was controlled by a public agency, so it was a corp. And in nonprofit corps in most of the land, they can do the same things with their assets that corporations can do, and unsecured creditors have the same kinds of rights to reach and attach anything that isn't encumbered or if it's encumbered that has excess value, so its assets were likely subject to creditor claims under applicable nonbankruptcy law.

So what I think this all demonstrates -- and it's a -- as I said before, a very important point that is going to ripple through the rest -- three other major points of controversy in this case. Number one, there's no foundation in Michigan law for any creditor belief or expectation or right that the DIA assets or any assets of the city other than property taxes along the lines specified in the Judicature Act can be reached by creditors to pay claims.

Number two, there is nothing about Chapter 9 itself that augments in any way unsecured creditor rights in Chapter 9. By the way, I forgot to say there's actually one place where secured claimants, if they're not special revenues, their rights are augmented, and that's because 1111(b) applies to nonspecial revenue secured creditors. That's not applicable here, so it's not as if they forgot. They're in a place where Congress decided to augment rights. They figured

out how to do it. They actually did it in Chapter 9.

There's no basis for any such expectation in the Bankruptcy Code, and, lastly, there is nothing about the cases that have been cited to your Honor for an expansion of the best interest test that would expand or create new rights that aren't recognized in the statute. And what does this mean for the trial? Well, if your Honor has read the pretrial briefs -- and I wouldn't blame you if you haven't read all of them yet -- the city is roundly criticized and I expect will be through all forms of expert testimony that they didn't do adequate work to value assets. They didn't do adequate work -- the city didn't do adequate work to market assets. The city didn't have an adequate due diligence effort concerning their assets. The city didn't divide them into, again, my view, nonexistent core and noncore categories, at least nonexistent as a matter of bankruptcy law. It is all claimed that these are factual issues that are important, that are worthy of your attention and of our time. They are not. Because there is no vehicle to get your Honor to rule on this earlier as opposed to later, we're going to put evidence on these things, too, because it turns out in a lot of ways a lot of the things that they claim we didn't do, the city, in fact, did, but it's not relevant because very clearly as a matter of law the rights of an unsecured creditor against a Michigan municipality and I

suspect many other states' municipality, but that's not our problem here -- municipalities -- that's not our problem here, is very limited and does not extend to assets.

I think the -- it's probably already obvious to your Honor and many people in this room that this is going to have very substantial implications for the best interest test and how narrow or broad the inquiries will have to be, but it also has significant implications on the evaluation of the DIA settlement, and that is what we're going to turn to now.

Approval of settlements. I came to settlements next because reasonable settlements that the Court is willing to approve set the parameters of what assets the city really has and what liabilities the city has to address. It was suggested that the approval of settlements might be used as an end-run around confirmation requirements. They don't do that at all. A settlement is necessary with respect to an asset where title isn't clear. A settlement is sometimes necessary where a particular creditor's rights aren't clear. And I'm referring, in particular, in this instance to the LTGO settlement, which has gotten its fair share of criticism in the papers.

In a way, approval of settlements are inputs to the confirmation analysis, and that's why they're next in the outline. The DIA settlement is part of the grand bargain, so let me define what I mean by the DIA settlement and what the

city means by the DIA settlement, and then we'll talk about the other parts of the grand bargain in a minute. The DIA settlement involves an agreement to transfer title of the DIA assets, which is the collection or at least a part of the collection owned in title by the city and the buildings and other property that is related to its exhibition, to what I call the DIA Corp. because the corporation that is currently the contracting party with the city to operate the museum is also called the Detroit Institute of Arts, so I call it DIA Corp., in trust. And in exchange for this transfer of title, the city gets three things. It gets a sum of money, 466 million over 20 years from foundations and the DIA Corp. I haven't mentioned the state consideration because the state consideration we regard, albeit a condition of this deal, is actually a separate deal. It's part of a separate deal relating to releases, but I'll get to that in a minute. Importantly, for purposes of ultimately valuing the 466, there are opportunities to get discounts for early payment. That's where the 6.75-percent discount comes in. And as of -- as certainly known to the Court, there are restrictions on how the money that is paid in respect to the DIA settlement can be used.

I will say that without trampling into the issue of what evidence can and can't be presented as a result of the existence of the mediation order and the mediation privilege,

I will go so far as to say that there has been no alternative that has surfaced that has given the city a comparable -- would give the city a comparable amount of money while the collection stays where it is in the City of Detroit and the DIA continues to operate it as it has operated. We'll talk about some of the other proposals a little bit later on.

The second element of value is that the attorney general and the DIA Corp. drop their objections to any disposition of the DIA assets. Litigation has not been commenced by either of them. That part is true. But it has most certainly been threatened. We put into evidence the -- or asked the Court to look at the attorney general's opinion and the DIA Corp.'s memoranda on these subjects to show that there are challengers primed, ready, willing, and able to object to, create litigation relating to an otherwise fight about dispositions of DIA assets that they don't approve of.

And lastly -- and this is the part that manages not to be mentioned in the opposition briefs but is, nevertheless, a significant source of value -- the city receives a commitment that the DIA assets will not be moved and will stay in Detroit.

As to this last item, Mr. Spencer purports to value this, the idea of the assets staying there by employing a methodology that he claims is emerging. We didn't burden the Court with a Daubert motion, but there are some issues with

the fact that it's emerging. But then he decides not to follow the methodology he describes as emerging because it's too expensive or too difficult to collect the data that the people who are working on this new methodology note is needed to perform the emerging methodology, and so your Honor will hear Mr. Spencer's testimony, and your Honor will hear about some flaws in his effort to minimize the value to the city of retaining the DIA assets here.

I think it is important to note that in addition to the fact that the opponents don't ever want to talk about this component of value, it is most assuredly the case that none of the alternatives presented by FGIC's experts give the city this element of value, and certainly the proposed sales don't give the city that element of value, but the proposed loan structure doesn't either. The problem with the loan structure is that it would have to be repaid, and the idea, I think, is that the lenders would get a lien on the collection to secure a large loan which it said could be as big as $4 billion, but there are lots of conditions, and there's actually -- $4 billion hasn't actually been committed. Actually, I'm not sure any amount has been committed. And then they say, well, there will be a lien on the art, and everyone will know that if the debt isn't paid, the art will wind up foreclosed upon or realized against -- in respect of a transaction if they can get satisfactory legal authority to

take such a lien, which they don't currently have under applicable Michigan law, and that that pressure will open the spigots and create the ability for the DIA to raise more funds. I don't think that's the kind of finance we are supposed to be encouraging, but I will also say that in light of the projections by the city, the city would have no ability to service the loan. In light of the DIA's fund-raising actual experience, they wouldn't either. So while the loan structure is advertising as a means of keeping the art in the city, it will achieve that temporarily. It will most assuredly not do so permanently.

I mentioned before that the DIA settlement is conditioned on the state settlement, but the state settlement is a separate deal. I don't know, frankly, that anyone has actually objected to the terms and conditions of the state settlement. I do believe that we'll have to deal with the evidentiary question, and I think the documents themselves resolve this, that the DIA and foundation contributions are exchanges for the art and that the agreement with the state are exchanges for releases.

Now, what do we do with the settlement? Well, there's well-established law as to the standards that a Bankruptcy Court has to apply to approve it. Number one -- and it's kind of a preficatory condition has to be met that the settlement has to have been negotiated arm's length

between parties who are not colluding, and sometimes it says they also have to be well-represented. Then the law actually talks about three factors in some cases, but they ultimately collapse. One -- not collapse as in disappear but collapse into one theme. One is probability of success in litigation, second is difficulties of collection or realization, and the third is complexity of litigation, including expense, inconvenience and delay that might be involved in the litigation. It is these three factors that are considered in constructing what the cases call a range of reasonableness, and that range of reasonableness is intended to encompass the possible outcomes if the controversies are actually litigated. Settlements are approved, we are told, if they are above the lowest bound of the range of reasonableness. We should just note for a second -- I'll come back to it -- that while there's been a tremendous amount of attention to how much the art might be worth at the high end -- and we most certainly will have evidence showing that that number is not $8 billion, in our view -- we wish it was -- that the upper end of the range isn't that important for purposes of what we have to do here today. And then finally we are supposed to consider the interests of creditors and a proper deference to their reasonable views, and, by the way, Syncora points out that the creditors you're supposed to focus on are creditors whose interests are being affected by the

settlement. Remember -- I'll come back to it later -- that we don't think any unsecured creditors' interests are affected by the settlement because they have no rights to these assets anyway. So we'll fold that into the settlement analysis in a second.

Dealing with the first part, which I know is going to be or might well be an issue of some contentiousness, who are the adversaries when dealing with the DIA settlement, and were they at arm's length? Well, there's no -- one of the adversaries was the retirees, and I never heard any allegation that the city and the retirees were not at arm's length or were colluding for any purpose. The retirees were also quite well-represented. Another group that's approved the plan that includes the settlement are the UTGO creditors. UTGO creditors were, no doubt, arm's length from the city, not colluding with the city, and well-represented. Another group that's approved the plan that includes the settlement are the LTGO holders, again, a group that has clearly been at arm's length from the city, not colluding with the city and well-represented. They were the parties on the other side that were asking for more and taking less, and perhaps they regard one of the consequences of that was that the art wasn't going to be there for them or, in the case of the retirees, not the value of the art, the total value of the art. There is no allegation that the city was not at arm's

length from the foundations, who also were separately and well-represented. And then finally there was ample evidence -- there is ample evidence that the city was at arm's length from the DIA Corp., which, to begin, has a board containing of prominent and accomplished individuals and also is represented by Honigman Miller and Cravath, Swaine & Moore, no doubt adequate.

Objectors' own papers report that the city's initial position was appropriate. In fact, their complaint isn't anything about the way the city started the case with respect to the DIA assets. Their complaint is about the fact that they ultimately made a deal, so let's review this for a second. In the June 14th, 2002, presentation for creditors, the objectors approve of the city position taken, which listed the DIA assets among assets that would be considered and looked at if -- and used if appropriate in order to develop value. They also cite public statements that were made at about the same time, mainly by Mr. Orr, some by his spokesman, Mr. Nowling, concerning that the city regarded the art as something that was on the table.

Finally, through discovery, it's become known that there were meetings between Mr. Orr's representatives, including yours truly, and the DIA Corp. early in the case, at which the city explained that there were arguments that the DIA assets were going to be part of a potential

bankruptcy case and the DIA Corp. would be well-advised to do something about that. And it was not about preparing a defense, but it was about raising money because a settlement might be a good idea.

All of this seems inconsistent with the accusation that the city did not do due diligence because the city's initial position lined up exactly with where the objectors would have wanted them to or say they wanted them to, and I suppose that for the time being we're going to have to say that the city and its representatives were either ignorant or lucky or they did our jobs or we did our jobs, and we'll come back to why it is that we can't really go deeper than that.

The next thing the city did was it did actually conduct a valuation. It was never advertised as a valuation of the entire collection but only of a meaningful part for a number of reasons. They were city-purchased art so that at least donor restrictions didn't have to -- wouldn't interfere with the analysis. It was a high concentration of relatively more valuable works, which the numbers put forth in the opposition paper seems to agree with. Narrowing the universe allowed for a real piece-by-piece appraisal, which is not possible with 60,000 pieces. And, frankly, it was thought that even though you were looking at a piece, it would provide some information about what we were dealing with as a whole.

As a result of all these things that happened early on in the case, I will say for sure I didn't receive holiday greetings from Alan Schwartz of Honigman -- of the Honigman firm or from Rich Levin of the Cravath firm or from the DIA at the end of 2013. They weren't happy with the city or with me, and I, frankly, wasn't happy with them. But I will also point out that at that point in the case there were no deals with any other creditor groups either, and then the outline of a deal emerged. And I think in bankruptcy we all know parties are not only allowed to make deals and compromise principles, the cases also say that's exactly what the parties are supposed to do. And the evidence will show that around that time parties started working on developing and later documenting the deal that became the DIA settlement, expanded to be the grand bargain when the state joined, and what the city didn't do was to continue efforts to develop a litigation position against the groups we were settling with. And why would we? Partly because this is because we had more than enough litigation to worry about, some of which were generated by some objectors, but it would have also been a big waste of time and money.

At this point, I think we're done showing that a settlement was reached at arm's length and not collusively, and here -- and it was shown even earlier today -- is where the objectors claim there were two additional inquiries that

need to be addressed. We think not. Number one, they say prove all the steps in the negotiations. We are entitled to know how it is you got from a position we approve of to a settlement that we disapprove of. And then they say tell us exactly how much legal research and analysis was done, and they claim that the settlement must mean that we didn't do enough. Well, there is no trace of this requirement in any of the cases. And, once again, we come to a point where the trial can be consumed and may well wind up consumed with trying to elicit and taking a great deal of evidence that's got nothing to do with the approval of the settlement. If you read through the cases, what they focus on is, number one, were the parties the right parties to be negotiating, do we believe that they were in the right position to negotiate the deal, were they not colluding, and then we're done until we get to the result. We'll get to the result and the range of reasonableness in a second.

Why is there that gap in the cases? Well, it makes a tremendous amount of sense because looking into those matters would involve inquiries that always involves -- would always invade settlement discussions that parties may want to keep confidential or are otherwise protected by privileges such as the one in evidence Rule 408. Some are negotiated in confidential and privileged mediations, and proof of what legal research and analysis was done would undoubtedly

require a disclosure of privileged materials. And this is why I said the Court is probably not going to get to decide whether the city was ignorant and lucky or did its job when it evaluated the situation with DIA assets and took an opening position in the case. The initial position and the results will have to speak for themselves.

So now we get to the really important part, is the DIA settlement in the range of reasonableness, and here I think there are three separate questions that need to be answered in order to decide what the range of reasonableness should be. Question number one, which is the question, by the way, and the only question that's actually focused on in the papers, can the city sell the DIA assets and give free title -- free and clear title to somebody else? Lots and lots and lots of ink has been spilled on that. There's a supplemental brief that runs roughly 180 pages, and the vast majority of it is devoted to that question. But I didn't start with that question when I started our argument today. I started with what I regard as the second question that also informs the range of reasonableness for the DIA settlement. Do unsecured creditors or even in this case secured creditors with deficiencies -- they're unsecured creditors, too -- have any right to compel the sale of DIA assets and recover anything from them? We've already answered that question. We're going to factor it in. But there's still a third

question that relates to the formation of the range of reasonableness, and that is should the city be compelled to sell the DIA assets even if they could and even if creditors had rights to reach those assets.

Your Honor, I think that if the answer to any of the three questions is no or close to no, then the lower bound of the range of reasonableness in this case for the DIA asset disposition that is part of the DIA settlement is zero or a number close to zero because if the city can't sell the DIA assets, a reasonable outcome -- a possible outcome is that there will be nothing. If creditors have no right to compel the sale of DIA assets or share in them as a matter of rights to distributions, then they are going to get zero from those assets. And if the city shouldn't because it's not a good idea sell the DIA assets even if the city can sell them and creditors have a right to sell them, then that's another reason why the lower end of the range would be pretty close to zero.

So, as I said before, we've already answered that second question. Just quick review. Unsecured creditors of Michigan municipalities have no remedies that reach city assets, including the DIA assets, and nothing in Chapter 9 changes this. From a creditor perspective, the DIA assets yield zero. Based upon the law that teaches us how to construct ranges of reasonableness, the lower bound of

reasonableness just on this basis is zero.

Next, I'm going to go to the question, question number three, should the city sell the DIA assets. There will be testimony from many witnesses concerning the importance of the Detroit Institute of Arts to the city. Some will come from DIA Corp. representatives, some from prominent citizens, some from government. The DIA, of course, is one of the few relatively -- they're one of the relatively few institutions that Detroit has that might draw residents back as, if, and when there is a recovery, and so -- oops -- get my pages in order -- it would be most assuredly a reasonable decision for Detroit to make to keep it in Detroit even if it did have the ability to sell it and even if the creditors could access it. And as noted before, in Chapter 9 decisions like this are decisions that not only are left to the reasonable business judgment of the City of Detroit, they are left to the City of Detroit. That's one of the very, very clear lessons of Bankruptcy Code Section 904. Since the city could, acting very reasonably, decide not to change the status of the DIA in any way, the range of reasonableness under this question, the question of what the city should do with the DIA assets, includes zero or is very close to it.

And now, finally, let's go to question number one, can the city sell the DIA assets. As I said before, this is

the only question that was really briefed in the papers by the opposition and in the papers that were filed by the DIA Corp, and I am one of the city attorneys but not the only one that was principally responsible for evaluating the facts and law surrounding the controversy. I will tell you that the objectors and the DIA Corp. papers more than adequately canvassed the issues, which is the requirement of the record that needed to be before the Court, not anyone else's private views. I have views on the strengths and weaknesses of the arguments presented on both sides, but they're privileged, and they've got nothing to do with the analysis. I'm not going to predict which side would win, but I will say this much because I think this is not controversial, and I think they're the two -- what I regard as the two critical observations that lead again to a determination that the reasonable range has to include zero.

First -- and this might keep me off the DIA Corp. Christmas card list -- I agree that the issue would be a good deal clearer if there was a formal agreement entitled, quote, "Trust Agreement," close quote, that was executed back when the museum was formed and amended over the years as the museum evolved. There's no question about that. But I'm also nearly certain that no one who donated art to the DIA or, as it turns out in most instances, donated to the DIA Corp., which was then afterwards donated by the DIA Corp. to

the DIA -- and by the way, whenever art was donated -- it seems it's common ground -- it was donated to the DIA Corp. or to the DIA. It wasn't donated to the, quote, City of Detroit, just a matter of formality that it was not written that way. I don't think any of the donors thought that the art could or would be sold to fill potholes, pay for the collection of garbage, pay for any other city services or pay debt -- any debt incurred for that purpose directly or indirectly. That's not why people donate art to museums. People donate art to museums so that other people will see it, and they all want it to be there forever.

Since a reasonable outcome, your Honor, of even this issue, can the city sell the art, is that the collection is protected by sale -- from sale by applicable law, as well as, don't forget, the law we started with, which is the law that limits creditor remedies to property taxes, and the museum may well be damaged if litigation is commenced and takes years to resolve, the lower end of the range of reasonableness on this view, the view that what matters is whether the art can be sold, is also close to zero.

Let's turn to the upper end of the range. When I started this topic, I said I didn't think that the upper end of the range figured that seriously in the analysis for this case. There sometimes is arguments that a settlement was so great that it was stretching the upper end of the range. But

to the extent that there's some general attitude about proportionality that ought to be -- that ought to be reviewed as well, we will prove that a reasonable valuation for the DIA assets is not eight billion, that it's considerably less, that there are considerable difficulties and problems in conducting any liquidation at all, and that the top end is a good deal lower than eight billion. But here again, the legal framework that specifies what the city has to show in order to earn its confirmation order and this Court's help in emerging from bankruptcy demonstrates that the focus really is at the bottom end of the range, not at a upper end of the range, and, again, to the extent that it turns out that there's hours and hours and hours of testimony about how high high is, that isn't really the best use of our time in the next few weeks.

The last part of the inquiry with respect to the settlement is the reasonable views of creditors, and, again, even Syncora says that the inquiry focuses on creditors who are adversely affected by the settlement. And Syncora's point, put as grossly as possible, is there's this really big asset, and we didn't get anything from it. There's a reason why I started with the analysis of what unsecured creditors' rights are of assets of the city because if I'm right about that, and I think I am -- I think the city is -- then Syncora is never going to be in a position to realize value from the

DIA assets. It's just not one of the rights that they have as an unsecured creditor of a city in the State of Michigan, FGIC, too. I didn't mean to single Syncora out. So I'm not sure that their views matter at all, but if creditor views matter, unsecured creditor views matter, there's a bunch of creditor views that have been expressed by votes to the plan, and there's a lot more creditors and a lot larger an aggregate amount of claims represented by those creditors who have effectively approved the settlement, and this, too, points in favor of approval.

Again, it's been a long part, but to summarize, the DIA settlement was negotiated arm's length without collusion by well-represented adversaries. The settlement is well above the lower bound of the range of reasonableness, and for three separate reasons, three separate ways of looking at the art problem, the lower bound of the range of reasonableness includes a number near zero.

There is overwhelming creditor support, but we're not sure it matters because, again, a fundamental point that is going to be resolved by your Honor is the rights of unsecured creditors in Michigan to assets of municipalities. And as we have seen, they have no rights, so the DIA settlement should be approved.

We are next told that the DIA settlement is a fraudulent transfer, and because it is claimed to be a

fraudulent transfer, the Court should not allow it to go forward and the plan should not be confirmed. Well, there's a little bit of circularity here. Actually, there's more than a little bit. If your Honor approves the DIA settlement, you will have decided that it is a fair resolution of the issues involved from the perspective of the city. And if the Court approves the other parts of the grand bargain and confirms the plan, the transactions that comprise the DIA settlement will close. But if the Court does not determine that the DIA settlement is fair to the city or if the Court decides not to approve some other aspect of the plan or of the grand bargain, the DIA settlement will not be consummated, so I think it's almost tautological. No fraudulent transfer is going to occur. Either a fair settlement is going to be implemented or a fair settlement will not be implicated. By the way, once again, the issue of fraudulent transfer is about whether creditors are being harmed by a transfer, and another reason why we began with a discussion of what unsecured creditors' really -- creditors' rights really are to city assets, including the DIA assets, is because it helps inform whether there's anything to any claim of a fraudulent transfer under any circumstances.

Moving to the state contribution agreement, I'm going to skip over it mainly because I don't detect a lot of controversy over whether the state contribution agreement

makes sense or whether it's a good idea or whether the contribution by the state was adequate. The parties that are giving up rights under the state contribution agreement are the parties in -- the PFRS pension class and the GRS pension class. They have voted to accept the plan. I think the -- and so I don't think there's any issue with respect to approval of the state contribution settlement except with the possible exception of the scope of releases. And I think as to the scope of releases, I may get to it if I have extra time at the end, which I don't think I will, but it is covered in the papers, and if it turns out to be a big point of controversy, we'll be back to it at closing.

The next settlement on the list is the LTGO settlement, and, again, I think the same methodology is appropriate, little bit different order. Once again, the city's initial position, very clear, made clear in the presentation to creditors dated June 14th, 2013, and it's in evidence. I think it was on both the Syncora and the FGIC list. And the city proposed to treat the LTGOs as a general unsecured claim pari passu with COP claims assuming, of course, that the COP claims were allowed. Of course, the presentation to creditors noted that the COP claims might not be. But as your Honor I'm sure remembers, the LTGO holders -- and there are some that are uninsured in this particular tranche -- and the LTGO insurer, which is Ambac,

disagreed with that position, and Ambac sued the city. Negotiations ensued after that lawsuit. They stalled, and an important hearing was held, and your Honor presided over it. I will tell you that the hearing I remembered being pretty lonely on my side of the room. FGIC, who says they now feel very strongly about this issue, wasn't there. Syncora, which has managed to stake a position in almost every other major issue that were -- that was decided by the Court, chose not to intervene there and wasn't there. The other side of the room was more crowded, and it had the -- Ambac, the insurer, a bunch of -- I think two prominent financial institutions who were holders of insured or uninsured pieces -- I don't remember which -- and a assortment of amicus briefs were filed with respect to that hearing. All were very -- clearly adversaries of the city. All were very clearly well-represented, and none were colluding with the city. Your Honor didn't rule from the bench. Settlement negotiations began again, and a deal that -- and a deal was reached.

The arguments that were not resolved in court but as to which risk undoubtedly existed were, number one, the UT -- excuse me -- the LTGO creditors asserted that those claims were secured by a lien. Number two, they proposed an assortment -- and your Honor commented on how many -- of what has -- what I think is sometimes called lien substitutes that might have been applicable to those particular bonds, and

while in the litigation but not part of the actual motion to dismiss, which was the -- motions to dismiss that was the subject of the hearing before your Honor was the meaning of the words "first budget item" which appears in the resolutions that relate to the UGOs -- the LTGOs. Once again, procedurally the right people were on the right -- different sides of the case. They were clearly not colluding. They were actually fighting about it before your Honor. Your Honor will know whether you thought that the positions were adequately litigated. It seemed to me that they were. What's the lower end of the range of reasonableness? Well, there is definitely the possibility that the LTGOs were unsecured creditors. No one contended that they should be disallowed. No one contended there was a discrepancy as to the amount, and no one contended they should be subordinated. What is the upper end of the range of reasonableness? That they would be fully secured by a lien, somehow protected by one of the -- I think there were five lien substitutes that were proposed, or that they were senior on some basis by reason of the, quote, first budget item language. Is the settlement in the range of reasonableness? Absolutely it is. Views of creditors, no creditors other than the COPs creditors have objected. The LTGO settlement should be approved.

I think we have time for one more large topic, and

that's the best interest of creditors test. There is immediately a collision, I think, between what is the best interest test in Chapter 9. The city says that the best interest test is a test that is applied to the creditor body as a whole. Do the creditors of the debtor overall do better than they would do under the plan? Some of the objectors contend that the best interest test is a test that is applied over and over again class by class to every class. Well, I think the statute, once again, answers the question directly, and it answers it in favor of the city's interpretation. The best interest test in Chapter 9 is codified in Bankruptcy Code Section 943(b)(7). It is not codified in 1129(a)(7). 1129(a)(7) doesn't apply. If you read 943(b)(7), the requirement reads -- two are clumped together -- "The plan is in the best interest of creditors and is feasible." Compare that to 1129(a)(7). I don't have it written in my notes, but it talks about that as to each class -- excuse me -- each creditor within a class that the best interest test has to be satisfied. The language is different, very different, not even close. In Chapter 9, it's focused on the entire plan for all creditors in the same way that 943(b)(7) deals with feasibility as the entire plan with respect to the entire city. There is no room in the structure of 943(b)(7), particularly compared with the language of 1129(a)(7), for a standard that is applied creditor by creditor or class by

class. It is a standard that applies to creditors overall.

Again, this has implications for the testimony that you really need to hear as opposed to testimony that people are going to offer because you are -- already have been treated to in the pleadings and will be treated to, I think, in evidence a whole bunch of hypothetical scenarios as to how a particular creditor can navigate the out of bankruptcy post-dismissal world in a way that is better for it than its particular treatment under the Chapter 9 plan.

If I thought that motions in limine were substitutes for motions of summary judgment, I would have made that motion, but I don't think that they are, so I think we may have to listen to that testimony but at the end understand that the standard we are applying is 943(b)(7), not 1129(a)(7), and that we need to look at the creditor body as a whole and how the creditor body is doing as a whole as compared with the dismissal scenario. I'm going to talk about dismissal quite a bit.

And by the way, everybody -- any one creditor can dream up a scenario, and it's going to be all about guesses about the future, but they can always speculate to a scenario where their result is better outside of bankruptcy and in bankruptcy, so there will be a lot of proposals made about how the world might be better for any particular creditor. Again, we don't think any are relevant.

So the next area I wanted to talk about in the best interest world is about asset sales, and with respect to the DIA assets, if the settlement is approved -- we believe it should be -- then we know what the asset is, that you have an acceptable settlement that resulted in some money that has a restriction attached to it, and that's the end of it. But even if the settlement isn't approved, we come back to where we started today, which is if the DIA settlement isn't approved and we were in a case where we just had the DIA assets, would the existence of the DIA assets have any bearing on the best interest test, and our answer is no. Number one, they are not available outside of Chapter 9 because Michigan law prohibits creditors from accessing them. They can't get an execution. They can't collect from them. They have an exclusive remedy. The exclusive remedy is the Judicature Act. In the FGIC brief they even concede that's it. So I see the best interest test as effectively having two components. One is has the debtor tried hard enough, made reasonable efforts -- how can anyone disagree with that as being a sensible requirement somewhere in the best interest test -- the other part being compare it to the dismissal alternative. From either perspective, city assets don't count. DIA assets don't count. Incorporate here everything I said in the first big unit that we discussed today.

Notice also that when we discussed the issue of whether or not DIA assets are city assets, can be exposed to creditor remedies, I was pretty careful also to talk about what would be reasonable expectations in light of the law as we find it. The reasonable expectations in the law as we find it for realization from assets, including DIA assets, is nothing, again, not properly part of the best interest test.

Now, argument has been made that municipalities sometimes decide to sell assets if and when they think it's appropriate, but that doesn't create an expectation that the assets are available to satisfy creditor claims when a municipality is in significant distress and doesn't want to sell assets. And the asset sale list that FGIC compiled or Mr. Spencer, their expert in all things, compiled, only one was really a distressed example, at least as I recognized it. I might not understand all the situations as well as I should. And that one was Harrisburg where the Chapter 9 case was dismissed and the municipality did have a gun to its head. That Detroit or another Michigan municipality may decide it's in its best interest to sell or privatize an asset just doesn't create a reasonable expectation that the assets are going to be sold to benefit a creditor when a creditor needs them to be sold.

Okay. What does this mean about our trial? I think I may have mentioned this earlier. I'm sorry if I did and

repeat myself, but complaints that the city didn't adequately investigate all of its assets in addition to the DIA assets, DIA assets -- they say we stopped looking at real estate too soon. The city is also criticized for inadequately understanding the tunnel, perhaps inadequately understanding the airport and the other things that are listed. The bottom line is that for best interest purposes for a Michigan municipality there is no obligation to do those things at all. They're just not part of the equation. Nevertheless, your Honor will hear evidence that the city did more than a reasonable amount, particularly under the circumstances of the background law, to fully understand what assets it had potentially available, what assets it might decide were in its own best interest to monetize and on what basis.

I have one more digression before getting to property tax increases, and that's a complaint by the objectors that the recovery notes are no longer part of the plan. Recovery notes, if your Honor will remember, are also described in the presentation, the proposal for creditors, dated June 14th. They are notes that had a nominal principal amount of $2 billion but no maturity. As you may recall in the eligibility hearing, the city was criticized a lot about the recovery notes and their indefiniteness. And they're no longer in the plan. And the truth is is they're not in the plan because creditors didn't want upside notes on any terms

that the city was willing to provide. What the city -- what the city -- what the city did in response to that is create something called B notes. I was told over lunch to make clear that we knew that the alphabet started with the letter A, and there actually were things called A notes that disappeared. There was also something called C notes that disappeared. The B notes were the ones that were left standing. The B notes were regarded as better. They got a deal done. Now, I don't know -- and it's probably a little late -- if Syncora would rather have the recovery notes from the June 14th presentation rather than B notes, and if that's what the problem really is, we might well have had a solution. I don't think it is really the problem, and the -- our response is is that we looked at that really hard. We don't think that by eliminating recovery notes we took things away that we could give creditors. I suppose in isolation that's true, but the plan also -- a lot of other things changed, including the introduction of B notes, including the bigger UTGO notes, including the bigger LTGO recoveries, which all affected whether or not you could ever also issue things like recovery notes. We think not.

Property tax increases in the best interest context. It is true that taxes assessed as a result of the application of the Judicature Act are not subject to state debt limits, but it is not true that tax increases always generate

additional revenue. And there are two reasons that this could happen, and the cases recognize two reasons. One is tax saturation, which is basically the time when by raising taxes you also increase the delinquency rate and don't generate as much net revenue as you wanted to and maybe even less net revenue than you did before. In general terms, the cases that discuss the tax saturation problem which municipalities can run into -- and we cite them -- cite some of them in the briefs. On the tax cases, let me pause here. In our briefs, we've generally cited and focused on cases from what I'll call the modern era, from the time when the precursor to the current Chapter 9 made it into the Code. In fact, tax increase cases -- the tax increase jurisprudence goes way back to the depression, and there are a lot of older cases. And it may well be that as part of closing we'll go back to some of the history behind the tax saturation cases and the cases that go by the unfortunate title, quote, "death spiral." But in our briefs we basically confined ourselves to the more modern cases, but there's a whole bunch of others back -- going back through history. So, at any rate, the first kind of taxation problem that you can run into is tax saturation, but there's another kind that, frankly -- tax saturation is clearly an issue with respect to Detroit, but I think it's easier, more direct, and kind of the facts have already been established that it's the second problem which

is the most significant problem for the City of Detroit, and that is is that raising taxes now is not compatible with the goal of saving the city. And the issue there is that the relevant cases talk about that raising taxes could cause a city to -- or any municipality to go into a state of decline that it can't escape from. And the most interesting -- and, again, it's not the only case on this point, but the most interesting of the modern cases is Villages at Castle Rock, and I want to read a quote from it, so if you'd give me a second to find it -- and this also -- this is an eligibility case, Villages at Castle Rock. There may have been a plan on file as well, but the discussion is clearly in the eligibility section. And we'll go into this in more detail in a minute, but I think the analysis is relevant both to the prong of the best interest test to look to whether the city is doing enough but also the prong of the best interest test that the opponents, the objectors say has to be settled by a dismissal analysis or some kind of dismissal forecast, and we're going to discuss whether that's really the case in a minute. So here's what the -- here's the words out of Villages at Castle Rock, and it's -- I think it's page 76 or 77 is the jump cite. "Given the evidence in that case, it is highly doubtful that the taxes which would be required from District 1 property owners could be collected." What they mean there is the amount needed to pay the debts. "The

required level of taxation would certainly discourage new home construction, thereby eliminating tap fee income and preventing a broadening of the tax base. Moreover, if unpaid taxes are enforced through tap sales, purchasers will be difficult to find since an excessive mill levy will make the homes uneconomic. Land is removed from the tax rolls if no bid is received at a tax sale. The mill levy on any property remaining on the tax rolls then must be increased still further in order to maintain the same theoretical of revenue. Kemper's brief aptly describes this cycle as a, quote, 'death spiral,'" close quote. Kemper's brief used that term because that's what -- the term that's used in the older cases.

As an aside, I don't like the term "death spiral." It's susceptible to misinterpretation. It's a label for a condition, and I'm going to use "downward spiral" as a synonym in our discussion today.

In addition to the concept which is real and has been found by the courts on multiple occasions to be a genuine limit on taxation and a reason why a municipality will not be required to raise taxes to pay creditors in circumstances where this could occur is that for the Court in the Villages at Castle Rock -- and, frankly, if you go back to the depression and post-depression era cases where this doctrine was first formed, this was all about projecting forward. You have a tax rate now. That's okay. If you

raise taxes, all these problems might occur, and if we find that those problems are going to occur don't raise taxes. Please hold that thought for a couple of seconds while I cover a few other things.

Number one, the two tests, the saturation and the test relating to downward spiral, are not completely separate tests. They're not completely separate concepts. They obviously do merge to some extent, and some cases talk about both of them. And Ms. Sallee does provide useful information concerning how to think about tax saturation and maybe even a little bit with respect to downward -- with the downward spiral situation in the work that she did, but as in the case of many other things that we've discussed today, there are, in fact, fewer issues in genuine dispute, in my view, over whether creditors in this case can seek greater recoveries from interests in property taxes. And I ask the Court to remember again its findings in the eligibility hearing, which were based on large part on the backup materials contained in the proposal for creditors book dated June 14th, 2013. Again, it's in evidence. You found that the population in Detroit is now declining, and it is; that the business base is declining. The tax revenues have been declining. In fact, you found that Detroit is already in the place that the Villages at Castle Rock court properly would not allow the Villages at Castle Rock to reach. It's sad, it's going to

change, but Detroit is in a downward spiral. Detroit is a downward spiral case not only because we might project that an increase in taxes would have the Villages at Castle Rock effect but because Detroit is already there as a matter of the facts that percipient witnesses can see and measure. Borrowing some words from the hearing that we just finished before I started, we're not talking about a need to project, to estimate, to speculate, or guess about a hypothetical. Detroit has these problems in the here and now. This isn't the only way to look at this problem without sending a whole bunch of experts off to go about to try to predict the future and convince your Honor what prediction is better. There are other facts that were established in the eligibility hearing and that are established in the proposal for creditors that are in evidence here that also show that Detroit shouldn't be raising taxes. Detroit has the highest tax rates of all cities in Michigan, and it has the worst level of services in the immediate area. Let's borrow an apt Chapter 11 analogy. Consider several competing department stores, and the one before your Honor in a Chapter 11 case has the highest prices and the lowest quality goods and services, and it's losing business to the relevant competitive set. Would anyone consider raising prices at that store? Of course not. The reality, again, is that most people who look for a new home in an area that has several towns and school districts look

at the differences in tax rates and what services are available to residents. It is certainly true that it is a little harder for people to change their residence when services decline than it is to change department store preferences, but Detroit has already reached the place where shoppers are finding alternatives and leaving, and not enough people are coming to take their place. A city in Detroit's situation -- again, the situation here and now, not a projection that's dealt with in the cases, can't raise taxes without further jeopardizing its future, and if it further jeopardizes its future, it pays creditors even less and collects less taxes.

So recognizing that Detroit as a matter of reality if it's going to succeed, if it's going to be rehabilitated, has to compete with other areas for residents and that its recovery will not succeed if it can't is still another reason why taxes can't be raised. Again, not hypothetical, here and now. Percipient witnesses can give you all the facts that you need.

I have a section here that I was going to say implications for the trial, but I think I've discussed about the implications for the trial. We should be focusing -- your Honor should be focusing on the facts in the proposal to creditors to the modest extent that they have changed. Conditions in the city today, what challenges does the city

have today. Frankly, your bus tour is exceedingly relevant on the question is where is Detroit today and whether we are dealing with a situation, unfortunately, where Detroit for all kinds of bad reasons -- and we can't recreate the past -- all kinds of reasons Detroit found itself in a place where most Bankruptcy Courts don't allow Chapter 9 debtors to go if they can help it.

This is actually a good place to stop, and I can pick up here -- pick up with the --

THE COURT: Okay.

MR. BENNETT: -- dismissal analysis part tomorrow morning.

THE COURT: Some planning questions for each of you. How much longer do you think you will be, sir?

MR. BENNETT: It will be less -- I would say about an hour.

THE COURT: Okay.

MR. BENNETT: About an hour.

THE COURT: Will there be other parties giving opening statements in support of the plan?

MR. O'REILLY: Yes, your Honor. We'll have about 30 minutes tomorrow for the Detroit Institute of Arts.

THE COURT: All right.

MR. ALBERTS: Your Honor, Sam Alberts on behalf of the Official Committee of Retirees. We think about a half an

hour as well.

THE COURT: Okay. And have you all worked out an order for the opening statements for the objecting parties? And what is that, please?

MR. KIESELSTEIN: Good afternoon, your Honor. Marc Kieselstein, Kirkland & Ellis, LLP, on behalf of Syncora. Your Honor, we have. I'm going to kick it off. And if my run-throughs prove accurate -- and they may or may not -- I'll be around 90 minutes, your Honor, and then I think Mr. Perez is directly after me.

MR. PEREZ: Your Honor, my run-throughs have been between 20 and 25 minutes, so let's 30.

THE COURT: Okay.

MR. WAGNER: Your Honor, Jonathan Wagner on behalf of COPs. We'll follow Mr. Perez and be about 20 minutes.

MR. DECHIARA: Your Honor, Peter DeChiara for the UAW. We're happy to go last. We have an opening that's probably ten, fifteen minutes.

MR. MACK: Your Honor, Richard Mack with AFSCME. About ten minutes.

MS. QUADROZZI: Your Honor, Jaye Quadrozzi on behalf of Oakland County. We had discussed with the COPs that Oakland would follow them. I should be about 40 minutes and then Macomb followed by Wayne.

MR. BRILLIANT: Your Honor, on behalf of Macomb, I

think I'll be about 20 minutes.

MR. NEWMAN: Your Honor, on behalf of Wayne, about 15.

THE COURT: Okay. Anybody else? Okay. Would anyone else like to bring up anything today before we adjourn? No. All right. We are in adjournment then. 8:30 tomorrow morning.

(Proceedings concluded at 4:52 p.m.)

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I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett — September 7, 2014

Lois Garrett